CHAPTER 2. INDIVIDUAL RIGHTS

Most of the liberties and rights created by the West Virginia Constitution appear in Article III, the State's Bill of Rights, although Articles I, II, and IV also contain some individual protections. Most of the latter pertain to voting and candidacy rights, and they are addressed in Chapter 3, below. This chapter considers the Article III provisions, which can generally be grouped under the umbrellas of the rights of expression, religion, due process, equal protection, and property. The materials below are organized under those umbrellas and follow that order, with a few miscellaneous rights sprinkled in. While federal interpretations of analogous provisions in the United States Constitution have greatly influenced the West Virginia Supreme Court's application of Article III, that Court has at times diverged from the federal course. In addition, Article III has several sections that do not have an analogous federal provision.

A. Freedoms of Expression

Read Article III, §§ 3,7,8,11,16,17, & 20.

Article III, § 7 protects the rights of an individual to speak and publish without unnecessary interference from the government. Although rarely invoking § 7 before 1979, the West Virginia Supreme Court has recently interpreted it along with §§ 3, 10, 11, 15, 16, and 17 of Article III (among others) to construct a comprehensive set of freedoms of expression, political participation, and conscience. Generally, the West Virginia cases track federal law but have yet to address the diversity of issues that have been developed by the federal courts. Nevertheless, as the Supreme Court of Appeals has sometimes stated, the protections of § 7 may be even broader than those provided by the First Amendment.

The freedoms of speech and press overlap and are, for the most part, governed by doctrines that apply to both. The following materials develop the major doctrines relating to the definition of protected "speech," to the government's ability to regulate the exercise of that privilege in the public forum, and to corollary rights of expression.

1. The Limits of Protected Speech

Not all speech content is "protected," in the sense that it is immune from proscription on the basis of its content. Indeed, § 7 itself specifically authorizes the legislature to enact "suitable" laws for the regulation of obscene materials and defamatory publications. Moreover, it cannot be questioned that the government can punish acts that involve nothing more than the spoken or printed word through laws prohibiting, for example, perjury, mail fraud, attempted bribery, or inciting a riot. Thus, some definition must be given to the term, "the freedom of speech." Some (most) speech is free, but some is not. The major categories excludable from protected speech and receiving judicial attention have been: incitement or unlawful advocacy, defamation and privacy, obscenity, and offensive speech. Those categories are addressed below.

PUSHINSKY V. WEST VIRGINIA
BOARD OF LAW EXAMINERS,
164 W.Va. 736, 266 S.E.2d 444 (1980).

McGRAW, Justice.

Petitioner, Jon Pushinsky, seeks a writ of mandamus to compel the respondents, the West Virginia Board of Law Examiners, to process his application for admission to the West Virginia State Bar. We are asked to decide if the Board may decline to consider an application for admission

to the practice of law when an applicant refuses to answer questions relating to his advocacy of or knowing affiliation with organizations advocating the violent or forceful overthrow of the government. We conclude that compelling applicants to answer the questions put forward here as a prerequisite to admission to the practice of law is constitutionally impermissible and we award the writ.

In June, 1979, petitioner, a citizen and resident of Wheeling, graduated from the University of Pittsburgh Law School and applied for admission to the West Virginia State Bar. Pursuant to Rule 2.000 of the Code of Rules for Admission to the Practice of Law, petitioner completed a character questionnaire designed by respondents to elicit information relevant to the applicant's "moral character and qualification for membership in the bar." Question 21 of that form reads as follows:

> 21. Do you advocate or knowingly belong to an organization or group which advocates the overthrow of the Government of the United States of America or of the State of West Virginia by force or violence?
>
> ____ Yes ____ No ____ Decline to Answer If the answer is "yes," give details.

Petitioner checked "____ Decline to Answer" in response to this question.

Petitioner took the West Virginia Bar Examination in July, 1979. He was later notified that action on his application for admission to the bar was being delayed and was instructed to meet with respondent board member, Jeremy McCamic. At that meeting on September 26, 1979, respondent McCamic asked petitioner whether he had intended to mark "Decline to Answer" in response to Question 21. Petitioner replied in the affirmative and indicated that he would continue to respond to the question in that manner.

Subsequently, in a letter from respondents' secretary dated October 9, 1979, petitioner was informed that no further consideration would be given to his application until he answered the following questions:

> No. 1. Do you advocate the overthrow of the Government of the United States of America or the State of West Virginia by force or violence? ____
>
> No. 2. Do you knowingly belong to any organization or group which advocates the overthrow of the Government of the United States of America or the State of West Virginia by force or violence? ____

In a letter dated October 17, 1979, petitioner explained that he would not answer the respondents' questions as a matter of individual freedom and constitutional law, but agreed to cooperate fully by answering all other constitutional inquiries. Petitioner was informed by a letter dated October 30, 1979, that because of his failure to answer the questions propounded in the letter of October, his application for admission to the bar would not be processed further. Petitioner then instituted this action under the original jurisdiction of this Court.

Petitioner maintains that the questions asked him by respondents impermissibly intrude upon his freedoms of speech, association and belief as guaranteed by the First Amendment to the Constitution of the United States and by article III, section 7 of the West Virginia Constitution. He asserts that the respondents cannot compel him to answer such questions and cannot refuse to process his application for failure to answer them. Respondents assert that the inability to proceed further with petitioner's application was not due to any political beliefs or associations which he may have had, but was prompted by his refusal to respond to questions propounded by the Board. It is the position of the respondents that Question 21 and the October 9 questions relate to petitioner's good moral character and therefore serve a legitimate state purpose. They maintain that irrespective of petitioner's actual associations or activities with respect to advocating the overthrow of the

government,[3] his refusal to answer the questions obstructs the respondents' investigations and is sufficient justification for the board's failure to process the application.

At the outset, we do not think it can be maintained that petitioner failed to respond to Question 21 on the character questionnaire. Petitioner chose one of the three possible answers which respondents provided to the question. The questionnaire did not require any further explanation of the "Decline to Answer" choice and did not indicate that it was an unacceptable answer. Irrespective of which answer was chosen by petitioner, it is clear that he did in fact answer the question as put to him.

Petitioner did, however, refuse to answer "yes" or "no" to the questions asked by respondents in the October 9 letter. It was upon this failure to reply that respondents refused to proceed further with petitioner's application.

I

The United States Supreme Court has discussed the issue of whether a state can compel applicants to the bar to answer questions relating solely to membership in certain organizations, consistent with the First Amendment. In Baird v. State Bar of Arizona, 401 U.S. 1 (1971), and In re Stolar, 401 U.S. 23 (1971), the applicants were denied admission to the bars of Arizona and Ohio, respectively, for refusing to answer questions concerning their past and present affiliation with groups advocating the violent overthrow of the government.[5] A plurality of the Court found that because the inquiries were so broad and vague as to include associations protected by the First Amendment, as well as unprotected ones, the State could not compel an applicant to answer those questions as a prerequisite to admission to the bar without violating his or her right to associate. "(W)hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." Baird, supra[.] We think respondents' questions here suffer the same constitutional infirmity of overbreadth as did the inquiries in Baird and Stolar.

Question No. 1, dealing with petitioner's personal advocacy of the violent overthrow of the government by force or violence, seems to encompass all advocacy, including that which the United States Supreme Court has held to be protected by the First Amendment. In Stolar, that Court declared that the State may not "penalize petitioner solely because he personally . . . 'espouses illegal aims'" . . . That Court has also held that the First Amendment does not permit a State to proscribe advocacy of the use of violent or illegal action except where the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Indeed, a distinction has long been made between "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" and "preparing a group for violent action and steeling it to such action." Noto v. U. S., 367 U.S. 290, 297-298 (1961). Statutes failing to make the distinction between "advocacy of the abstract" and "advocacy of action" have been struck down as impermissible intrusions upon the guarantees of the First and Fourteenth Amendments.

Respondents argue that the distinction between advocacy of action and advocacy of the abstract is not applicable here since Brandenburg and Noto dealt with the standard under which an individual

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[3]There is no allegation by respondents that petitioner has ever engaged in activity or associations which involved advocating the violent overthrow of the government. Nor, claim respondents, is there any reason to believe that petitioner would have been denied admission to the bar if his answers had been in the affirmative.

[5]In Baird, the applicant refused to state "whether she had ever been a member of . . . any organization 'that advocates overthrow of the United States Government by force or violence.' " 401 U.S. at 5. In Stolar, the applicant was required to state whether he had ever been or was presently "a member of any organization which advocates the overthrow of the government of the United States by force," and to list the names of any groups to which he belonged. 401 U.S. at 27.

can be criminally prosecuted. They contend that the standard is not the same when dealing with questions put to an applicant to the bar. We think, however, that the distinction was not intended as a standard for determining criminal liability but rather as a demarcation between those forms of speech and association protected by the First Amendment, and therefore unable to be abridged by Congress or the States in any manner, and those that are not so protected. The Supreme Court has recently applied the principle in a case not involving criminal sanctions. See Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974).

Before advocacy can be prohibited by the state then, it must be advocacy of action, something more than merely "espousing illegal aims." Other forms of advocacy are protected by the First Amendment and the failure to respond to inquiries about such protected advocacy may not be used by the state to penalize an individual. Respondents' question No. 1 embraces within its scope all forms of advocacy, including those protected by the state and federal constitutions. We think for that reason the question is fatally overbroad.

We think respondent's question No. 2, which deals with an applicant's knowing membership in an organization which advocates the overthrow of the government by force or violence, also fails to meet the criteria announced in Baird and Stolar and adopted here by us. Respondents here require only that the question be answered by an applicant who belongs to organizations which he or she knows to have as one of its goals the violent overthrow of the government. Certainly, a question delving into knowing membership is more limited in scope than the questions in Baird and Stolar, where applicants were required to speculate as to the goals of all organizations or groups with which they had ever been affiliated. However, as noted by Justice Stewart, who concurred in both Baird and Stolar, state inquiries must be further limited to applicants with the specific intent to further the illegal goals of the organization. Baird, supra[.] This principle is supported by a long line of Supreme Court decisions. Respondents' question No. 2 is not limited to specific intent on the part of the applicant and therefore embraces associations which the United States Supreme Court has held to be protected by the First and Fourteenth Amendments.

Respondents do not deny that under the test set out above, Question No. 2, dealing with membership in subversive organizations, is constitutionally defective. They contend, however, that when Question No. 2 is read in conjunction with Question No. 1, dealing with personal advocacy, the specific intent limitation is overcome and the questions become permissible inquiries into unprotected activities and associations. Respondents rely on Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971), in which the Court upheld questions asked of applicants to the New York Bar as constitutionally permissible. Wadmond, decided and published as a companion case to Baird and Stolar, legitimized a two-part New York inquiry which delved, first, into the applicant's knowing affiliation with organizations advocating the overthrow of the government and then into the applicant's specific intent to further the illegal goals of the organization.[8]

Respondents maintain that the October 9 questions, like those in Wadmond, include the element of specific intent and are therefore limited only to unprotected associations. We think, however, that

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[8]The New York question reads as follows:

26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during a period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?

If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence, or any unlawful means?

the distinction between the Wadmond questions and the October 9 questions is clear. The New York questions dealt particularly with the specific intent of the applicant to further the aims of the organization with which he or she is associated to overthrow the government. Respondents' questions do not fulfill this requirement. Rather, respondents would infer from an applicant's affirmative answers that the personal advocacy which he admits necessarily involves the specific intent to further the "subversive" goals of the organization to which he belongs. Such is not necessarily the case. Petitioner may, as we have already held, permissibly advocate the overthrow of the government. He may also belong to an organization which he knows advocates such action. He, himself, however, may have no specific intent to further the illegal aims of the group. Indeed, he may be a member of the organization because it also advocates other worthwhile aims, such as service to the poor. The conclusion respondents would have us draw is precisely the sort of state inquiry which is banned by the First Amendment. The October 9 questions are no more than Question 21 of the character questionnaire broken down into two overly broad inquiries into protected areas of speech, association and belief.

Of course, the Supreme Court's interpretation of the First Amendment is binding on this Court through W.Va.Const. art. I, § 1. Even if it were not, we would be inclined to adopt the high court's approach under our own constitution provision protecting freedom of speech. W.Va.Const. art. III, § 7. Moreover, in view of our state constitutional provision regarding the right of the majority to "reform, alter, or abolish" an inadequate government, we think that the West Virginia Constitution offers limitations on the power of the state to inquire into lawful associations and speech more stringent than those imposed on the states by the Constitution of the United States. We conclude that questions asked of an applicant to the bar by the Board of Law Examiners inquiring into mere advocacy of or knowing membership in organizations advocating the overthrow of the government by force or violence impermissibly infringe upon rights guaranteed by the First Amendment to the Constitution of the United States and by article III, §§ 3 and 7 of the West Virginia Constitution.

II

The respondents also maintain that even if the questions asked of petitioner do infringe upon his constitutional rights, the interest of the state in insuring the proper moral character of a bar applicant outweighs the interest of petitioner in asserting his rights. . . .

We think it is beyond question that the state has a legitimate interest in insuring the proper character of a prospective attorney. [Baird]; In re Eary, 134 W.Va. 204, 58 S.E.2d 647 (1950). We also agree that the state may place upon each applicant, as West Virginia does here, the affirmative burden to prove his good moral character as a prerequisite to admission to the bar. Konigsberg v. State Bar of California, 366 U.S. 36 (1961). We do not think, however, that the questions posed by respondents serve to further that purpose in the least restrictive manner. . . .

There is no indication in the prior decisions of this Court that the requirement of good moral character was established to protect the state from so-called "subversive attorneys." Rather we think the language of these cases amply indicates that the purpose of the requirements was to insure that dishonest, unscrupulous or corrupt individuals would not use their knowledge of the law to perpetrate fraud upon the unsuspecting and unknowledgeable public or to obstruct the proper administration of justice for their own or their clients' benefit. We do not think that this goal can be reached by barring from the practice of law those who merely advocate or belong to groups which advocate the overthrow of the government by force. This cannot be universally proclaimed to be a moral weakness. It appears to this Court, rather, to be a political philosophy. One cannot be held to have failed to prove good moral character in the sense of being an honest and truthful person simply by the fact that he clings to certain political philosophies with which the Board of Law Examiners and, perhaps, a majority of Americans disagree.

Moreover, the respondents have ample evidence of the petitioner's moral character from the other inquiries on the character questionnaire. ... "When a state seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect

a legitimate state interest." [Baird]. The respondents here have failed to show that the state must have petitioner's answer to the questions in order to assess his moral character. . . .

We hold therefore that the refusal of the [Board] to process an application for admission to the bar may not be predicated upon the failure of an applicant to respond to questions which inquire into beliefs and associations protected by the Constitution of the United States and the Constitution of West Virginia. Respondents must process petitioner's application for admission to the practice of law with all due speed and in conformity to the principles enunciated herein. . . .

NOTE

The West Virginia Supreme arguably limited the sweep of *Pushinsky* in two cases rejecting labor unions' challenge to the 2016 "Workplace Freedom Act," W. Va. Code §§ 21-5G-1, *et seq*., which brought a "right to work law" to West Virginia, prohibiting union membership as a condition for continued employment, and further imposing civil and criminal liability for agreeing to any contract requiring employees to pay agency fees to a union. *Morrisey v. AFL-CIO*, ___ W. Va. ___, 842 S.E.2d 455 (2020) (reversing summary judgment for the unions); . *Morrisey v. AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017) (reversing a preliminary injunction for the unions). The Court declined to follow *Pushinsky's* lead that the West Virginia Constitution's freedom of association is broader than its federal counterpart because, unlike Pushinsky's citation to Article III, § 3, the unions had not cited to the Court any relevant state constitutional provision suggesting a different conclusion. *But see* Article III, § 16 ("The right of the people . . . to consult for the common good . . . shall be held inviolate.")

NOTES: WEST VIRGINIA DEFAMATION AND PRIVACY LAW

1. *Overview*.

[From ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 86-87 (2nd ed., Oxford University Press, 2016).]

> Section 7 specifically authorizes the Legislature to enact both criminal and civil legislation to redress defamation of character, although that body has done little to exercise that authority. Section 8 also addresses libel, providing defendants a defense if they prove the publication was truthful and published with good motives and for justifiable ends. As seen in the following cases, however, the law of defamation has been constitutionalized to a substantial extent by the United States Supreme Court. *E.g., Gertz v. Welch* (U.S. 1974); *New York Times v. Sullivan* (U.S. 1964). The West Virginia Court has adopted the federal standards as the constitutional minimum for interpreting § 7 and has, on occasion, applied a distinctive gloss to them. (See especially the *Suriano* decision, reprinted below. Other cases of note include *Pritt v. Republican National Committee*, 210 W.Va. 446, 557 S.E.2d 853 (2001), and *Heinerman v. Daily Gazette Co.*, 188 W.Va. 157, 423 S.E.2d 560 (1992). The latter has significant opinions from both Justice Neely, for the Court, and Justice Miller, in dissent.)
>
> The requirement of a free press means that liability for libel cannot be imposed unless the plaintiff overcomes the press's qualified privilege to report on matters of public concern. The scope of the privilege turns primarily on the status of the plaintiff. There are, for defamation purposes, three types of plaintiffs: (1) public officials and candidates for public office, see *Sprouse v. Clay Communications, Inc*. (1975) (*infra*); (2) public figures; and (3) private figures. For the first two to prevail, they must prove "actual malice," as that term is explained below in

the note on *Sprouse*. Private figure plaintiffs must prove that the defendant was at least negligent in making a false allegation. "Public officials are 'those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'"[1] They include elected officials, *Long v. Egnor* (1986), and police and other law enforcement personnel, *Dixon v. Ogden Newspapers, Inc*. (1992), but not an individual who holds only a low-level or quasi-governmental position. The allegedly defamatory publication must also refer, implicitly or explicitly, to the official's public capacity. Public figure plaintiffs materialize in two contexts. They can be individuals who by their fame or notoriety have become so pervasively recognizable that they qualify as all purpose public figures. Alternatively, they may have thrust themselves into a particular controversy that, for purposes of discussion about that controversy, they become limited purpose public figures. Gertz.

The latter concept is a major focus in *Suriano, infra*.

2. *Sprouse v. Clay Communications, Inc.*, 158 W.Va. 427, 211 S.E.2d 674 (1975). James Sprouse, an unsuccessful gubernatorial candidate, brought a libel action against the Charleston Daily Mail for a series of articles, published shortly before the general election, in which the paper implied Sprouse had reaped big profits through improper land transactions. The defendant, relying on information supplied to it by Sprouse's opponent -- that noted protector of public integrity, Arch A. Moore, Jr. -- described the purchase and sale of Pendleton County property by a corporation in which Sprouse held an interest. In fact, the transactions were entirely legitimate and above-board, and the newspaper never explicitly stated otherwise. It did, however, run glaring headlines with its reports that clearly gave the impression that Sprouse had acted fraudulently. The defendant also juxtaposed misleading pictures with accusations by Moore. A sampling of the headlines included: "PENDLETON REALTY BONANZA BY JIM SPROUSE DISCLOSED;" "FORTUNE TO JIM SPROUSE BUT PITTANCE FOR SENECA;" "'DUMMY FIRM' SEEN PROVING CORRUPTION;" and especially, "MOORE ASKS FEDERAL PROBE INTO SPROUSE'S PENDLETON LAND GRAB." The plaintiff proved these stories and their defamatory inferences were published in cooperation with the Moore campaign and with the intent to disparage and defeat the Sprouse candidacy.

Justice Neely's opinion for the Court[2] contained several holdings of note. First, following *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1970), the Court found that a political candidate must satisfy the same "actual malice" standard as is imposed on public officials. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Second, under that standard, the plaintiff can recover only if he proves: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of the truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material. Third, the oversized headlines that led the average reader to an entirely different conclusion than the facts recited in the body of the story, combined with proof the defendant used the misleading headlines to create a false impression, established a sufficient basis for the plaintiff to prevail in his libel action.

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[1]Hinerman v. Daily Gazette Co., Inc., 188 W.Va. 157, 180 423 S.E.2d 560, 583 (1992) (quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).

[2]Justice Hayden (later a U.S. District Judge) and Justice Sprouse (the plaintiff -- later a Fourth Circuit Judge) recused themselves.

3. *Havalunch v. Mazza*, 294 S.E.2d 70 (1981). In 1973 the Daily Athenaeum ran a tongue-in-cheek review of various Morgantown eateries. Included among the selected establishments was the Havalunch Restaurant, a family business that operated on Pleasant St. for many years. Ms. Mazza's dining experience there was not a positive one and prompted the following assessment: "HAVALUNCH -- Bring a can of Raid if you plan to eat here. And paint your neck red; looks like a truck stop. You'll regret everything you eat here, especially the BLT's." The Havalunch proprietors were not amused. They filed a libel action and recovered a $15,000 jury verdict against the reporter for punitive damages. (No general damages were assessed.)

The Supreme Court of Appeals, through Justice Neely, reversed. The Court placed the restaurant in the category of private figures, who had only to prove the defendant had negligently made false allegations rather than satisfy the actual malice standard required of public figures. Consistent with New York Times v. Sullivan, however, the award of damages was reversed because presumed and punitive damages could be recovered only if the plaintiffs had proved the defendant knew the reported information was false or acted in reckless disregard of the truth. Moreover, the judgment against Ms. Mazza had to be set aside because her review of the restaurant was protected under the doctrine of fair comment. The Court adopted the standard set forth in Restatement (Second) of Torts, § 566:

> A defamatory communication may consist of a statement in the form of opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Relying on Comment D to that section, Justice Neely also acknowledged that a degree of tolerance must be allowed for the role that humor and hyperbole often play in publications.

Justice McGraw disqualified himself, "In Extenso," reminiscing with great fondness about the delectables he consumed at the Havalunch while a student at the West Virginia University College of Law and about the restaurant's "clean and cheerful atmosphere."

4. *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W.Va. 1984). Justice McGraw summarized the facts in this action for damages under libel and privacy theories:

> On December 5, 1977, the defendant published an article in one of its newspapers concerning women coal miners. Photographs of the plaintiff, a miner with the Westmoreland Coal Company, taken with her knowledge and consent, were used by the defendant in conjunction with the article. Her name was specifically mentioned, and her picture appeared . . .. After publication of this article in 1977, Crump had no contact with the defendant, and the defendant did not request permission to use her picture in any other newspaper article.
>
> On September 23, 1979, an article entitled "Women Enter 'Man's World'" appeared in one of the defendant's newspapers. The article generally addressed some of the problems faced by women miners, and by women who desire employment in the mining industry. The article related incidents in which two Kentucky women were "'stripped, greased and sent out of the mine' as part of an initiation rite"; in which a woman miner in southwestern Virginia was physically attacked twice while underground; and in which one Wyoming woman "was dangled off a 200-foot water tower accompanied by the suggestion she quit her job. She did." The article also discussed other types of harassment and discrimination faced by women miners. Although Crump's name was not mentioned in the article, her 1977 photograph was used, accompanied by a caption which read, "Women are entering mines as a regular course of action."

Crump alleged that, contrary to the article's implications, she had not been the victim of any harassment as a coal miner and that "the unfavorable attention precipitated by the publication of her photograph in conjunction with the article . . . damaged her reputation and caused her a great deal of embarrassment and humiliation."

The Court held Ms. Crump's allegations presented questions for the jury under both her libel and

privacy theories. The "defamation may be accomplished through inference, implication, innuendo or insinuation, as well as through direct reference" and can be made through photographs as well as verbal statements.

The mere fact the article concerned a matter of general interest was not enough to put use of the photograph within the fair comment privilege. On remand the trial court would have to determine "whether the unauthorized publication of Crump's photograph was sufficiently in the public interest due to its relationship to the subject matter of the article . . . and not whether the content of the article apart from its connection with the publication of Crump's photograph was privileged."

In its privacy analysis, the Court recognized a cause of action against a publisher for invasion of privacy. Such actions frequently present free speech/press issues similar to those raised by defamation law. Privacy claims against the media have been recognized for (among other things) falsely representing private facts about the plaintiff to the public and for publicly disclosing true, private facts about the plaintiff.

Crump was a "false light" case; the plaintiff alleged the defendant had published false, private facts about her. False light is the most similar to defamation. Both torts deal with falsehoods, and both redress damages to the plaintiff's self-esteem and emotional well-being. The torts diverge on the precise nature of the personal interests they protect. In a defamation claim, the disclosure injures the plaintiff's reputation, while in a false light case, the publication pries into subjects that an average person would want to keep from public light. Nevertheless, plaintiffs often allege both torts in their complaints. (E.g., a publication that the plaintiff engages in aberrational sexual behavior would implicate both causes of action.) The similarities between the two torts prompted the Court in *Crump* to apply the same constitutional privileges to false light cases as it does in defamation actions. Thus, public figure false light plaintiffs must prove actual malice, and their private figure counterparts need only prove that the defendant acted negligently in publishing the false information.

Another privacy tort, public disclosure of true private facts, has yet to be directly addressed by the West Virginia Court. In *State ex rel. Daily Mail Publishing Co. v. Smith* (1978), *aff'd Smith v. Daily Mail Pub. Co.* (U.S. 1979), the Court struck down a criminal law that forbid publication of the name of a juvenile court defendant without the permission of a judge. Although the State Court rested its decision on other grounds, it approvingly referred to federal decisions holding that publishers have an absolute defense if they accurately publish information obtained from public records or public meetings.

STATE EX REL. SURIANO
v. GAUGHAN,
198 W.Va. 339, 480 S.E.2d 548 (1996).

CLECKLEY, Justice:

In this original proceeding for a writ of prohibition, the relators, the Ohio County Education Association [hereinafter the OCEA] and Joseph Suriano, Jr., former president of the OCEA, request that we prohibit the respondent, the Honorable Martin J. Gaughan, Judge of the Circuit Court of Ohio County, from holding further proceedings in the underlying libel action filed by Thomas J. Romano, M.D. The alleged defamatory statements were contained in a newspaper advertisement and a newspaper article in which the OCEA and then-president Suriano criticized Dr. Romano's withdrawal from West Virginia state insurance programs and other changes in public employees' health benefits occasioned by the Omnibus Health Care Act of 1989. We issued a rule to show cause and now grant the writ of prohibition.

I.

Chapter 2

FACTUAL AND PROCEDURAL HISTORY

In 1989, the West Virginia Legislature enacted the Omnibus Health Care Act of 1989, codified in W. Va.Code, 16-29D-1 et seq. (1989). The relevant part of this Act required physicians and health care providers who provided services to patients having insurance through one of West Virginia's state insurance programs (Public Employees Insurance Agency [hereinafter PEIA], Workers' Compensation, Medicaid, and Division of Rehabilitation Services) to provide services to patients covered by any and all state insurance programs. Prior to the passage of this legislation, physicians were not required to accept "all or none" of the state's insurance programs; rather, medical providers could choose to accept only one or some of these insurance recipients and decline to accept as patients other state insureds.

In the present case, the respondent herein and plaintiff below, Thomas Romano, M.D., had provided services to state insureds covered by the PEIA and Workers' Compensation state insurance programs. Following the passage of this legislation, however, Dr. Romano determined that he would not provide services to any patient covered by any of West Virginia's four state insurance programs. Consistent with the procedures implemented by PEIA in the wake of this new legislation, Dr. Romano notified PEIA that he was withdrawing from the program and that he would no longer be a participating provider with regard to PEIA insureds. Dr. Romano did, however, obtain authorization from PEIA to continue seeing patients, who were PEIA insureds, on a private basis. Under this arrangement, these patients would be personally responsible to pay Dr. Romano's treatment fees, and neither Dr. Romano nor the patient would be permitted to submit these claims for reimbursement by PEIA.

Due to the statewide withdrawal of healthcare providers from participation in state insurance programs occasioned by the Omnibus Health Care Act, PEIA sent a memorandum, dated December 7, 1989, to its insureds listing the withdrawing doctors. This memo also notified state employees of the effective date of these physicians' withdrawals and when their services would no longer be covered by PEIA. Among those physicians listed were Dr. Romano and approximately eleven other physicians practicing in or around Ohio County, West Virginia.

The relators herein, and defendants below, the [OCEA and its then-president, Joseph Suriano, Jr.], discussed the PEIA memo at the OCEA's regular monthly meeting in December, 1989. Individual members of the OCEA, angered by their perceived exodus of Ohio County physicians from the state insurance programs, determined that they would place an advertisement in two local Wheeling, West Virginia, newspapers, the Wheeling Intelligencer and the Wheeling News Register, to inform current and retired state employees about the physicians withdrawing from the state insurance programs. The advertisement read as follows:

YOUR CHILDREN'S TEACHERS AND
THEIR FAMILIES HAVE BEEN DENIED
HEALTH SERVICES BY THESE
OHIO VALLEY PHYSICIANS.

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DATA PROVIDE [SIC] BY PEIA

This advertisement apparently was published three consecutive days, one of which was

December 18, 1989.

On December 19, 1989, the Wheeling News Register published an article regarding an anticipated rally by the Ohio County teachers and other state employees, planned for that evening, to oppose the Omnibus Health Care Act. The rally was scheduled to coincide with the announcement of changes in PEIA premium rates by Sally Richardson, then-director of PEIA. The article discussed the OCEA advertisement and listed the physicians named therein, noting their particular fields of practice. Additionally, the article quoted Suriano as saying, "'Certain public employees need to know who is not treating them now [.] We felt that the teachers needed to know that. Maybe this will shake those doctors up[.] They should honor their professional code. We would not turn away one of their children.'"

In response to the OCEA advertisement and Suriano's comments in the subsequent newspaper article, Dr. Romano wrote to Suriano requesting that he and the OCEA apologize, in writing, to Dr. Romano and retract their statements. Both Suriano and the OCEA refused to rescind their statements. . . . [O]n approximately March 27, 1990, Dr. Romano filed a civil action against Suriano and the OCEA, in the Circuit Court of Ohio County, alleging that the newspaper advertisements and Suriano's published comments constituted defamation and libel. Suriano and the OCEA filed a motion to dismiss and a motion for summary judgment, but the circuit court denied both motions on March 10, 1995. . . . [T]he relators request this Court to prohibit Circuit Judge Gaughan and Dr. Romano from scheduling this case for trial or otherwise proceeding with this matter.

II.

DISCUSSION

A. Standard for Issuing Writ of Prohibition

Prior to reaching the merits of the relators' contentions, we must first determine whether prohibition is appropriate in the instant case. Generally, we decline to exercise original jurisdiction in cases involving merely factual disputes. . . . We limit our exercise of original jurisdiction because ["mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. As extraordinary remedies, they are reserved for really extraordinary causes." State ex rel. United States Fidelity & Guar. Co. v. Canady, 194 W.Va. 431, 436, 460 S.E.2d 677, 682 (1995).]

The relators contend that prohibition is appropriate in the present case and quote Syllabus Point 1 of Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986), in support of their position:

> "Prohibition will lie to prohibit a case from proceeding to trial when the remedy of appeal is manifestly inadequate to protect against the chilling effect of allowing a suit to proceed because the complaint, as a matter of constitutional law, contains insufficient allegations to warrant interference with a citizen's right to free speech under the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution."

. . . Based upon our prior decisions, . . . we find that prohibition is an appropriate remedy in the instant case because it does not involve solely a factual dispute. The parties raise two issues which can be decided by a court as matters of law: (1) whether Dr. Romano was a private individual or a public figure with regard to the changes in the state medical insurance programs, . . . and (2) whether the newspaper advertisement and statements contained in the newspaper article can constitutionally provide the basis for a libel action[.] . . .

Although we decide this case within our original jurisdiction, we think it appropriate to bear in mind the United States Supreme Court's admonition in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984):

> "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' "

We believe that our prior prohibition cases concerning free expression issues reflect that we have faithfully adhered to that instruction and to its underlying policy concerns in exercising our original

jurisdiction as well as in the appellate review context. E.g., State ex rel. Hudok v. Henry, 182 W.Va. 500, 389 S.E.2d 188 (1989); Long v. Egnor, supra. And we do so here.

B. Type of Plaintiff: Private Individual or Public Figure

It is now well established that a libel plaintiff's status sets the standard for assessing the defendant's conduct. Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254 (1964). . . . Private figures need only show that the defendants were negligent in publishing the false and defamatory statement. E.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-48, 350 (1974).

In this case, the relators argue that Dr. Romano was a limited purpose public figure with regard to discussion about the Omnibus Health Care Act of 1989 and related health care changes. In [Gertz], the United States Supreme Court distinguished public figures from private individuals in the following manner: (1) public figures and officials have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy," . . . and (2) public figures and officials have assumed the risk that, in commenting upon public matters, the press may inadvertently report erroneous statements about them[.] Some individuals, because of their prominence or notoriety, are public figures for all purposes. Others have merely "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," [id.], and they thereby become "limited purpose public figures". The relators rely on the latter category and contend that Dr. Romano's efforts to influence the debate over public health insurance programs qualified him as a limited purpose public figure.

The doctor insists that he was not a public figure, for a limited purpose or otherwise. In particular, he disputes the relators' contention that he had access to channels of effective communication. Although he wrote several letters to professional organizations, newspapers, and professional publications, he points out that he did not have any control over the decision to publish his writings. Several of them, apparently, were not published.[10] Dr. Romano claims that he did not voluntarily assume or achieve a role of special prominence in the controversy. This lack of prominence, he says, is evidenced by the December 19, 1989, newspaper article, in which Suriano's allegedly defamatory comments appear. Although various [area] physicians were quoted in the article, Dr. Romano was neither interviewed nor quoted. Consequently, he asserts that his failure to be mentioned in the article, other than with regard to the relators' advertisement, suggests that he had not achieved special prominence in the public debate. Therefore, Dr. Romano maintains he was not a public figure concerning the Omnibus Health Care Act controversy.

Before resolving the dispute about Dr. Romano's status, we think some elaboration of our understanding of the limited purpose public figure doctrine is in order. As the United States Court of Appeals for the Fourth Circuit stated, "a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 n. 10 (4th

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[10]It appears, however, that the Wheeling News Register published Dr. Romano's May 2, 1989, letter concerning government regulation and financing of health care. . . . In addition, the relators represent that Dr. Romano's letter to the editor of the Wheeling Intelligencer responding to the relators' advertisement was published, . . . as were several of his letters to the editors of the Wheeling Intelligencer and the Wheeling News Register responding to letters written by a local college professor, Bruce Hartung, regarding publicly-funded health care[.] Furthermore, the relators allege that the West Virginia Medical Journal printed at least one of Dr. Romano's letters to that publication's editor. . . . Finally, the relators state that Dr. Romano indicated in his deposition testimony that several elected officials had responded to his [letters].

Cir.1994). . . . In this regard, the federal courts have "developed a two-part inquiry for determining whether a defamation plaintiff is a limited-purpose public figure. First, was there a particular 'public controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" [Foretich.] From there, the federal circuits have devised various formulae for analyzing the facts. ...

In our view, the emphasis must be on the twin rationales identified in Gertz: public figures have voluntarily waived their private status (at least to the extent they engage in a particular debate) and have ready outlets to respond to attacks, but private figures have not and do not. The "more important" of the rationales is the "compelling normative consideration," [Gertz], that public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." [Foretich.]

Accordingly, we hold that a libel plaintiff is a limited purpose public figure if the defendant proves the following:

(1) the plaintiff voluntarily engaged in significant efforts to influence a public debate[11] and voluntarily assumed a position that would propel him to the forefront of a public debate--on a matter of public[12] concern;

(2) the public debate or controversy and the plaintiff's involvement in it existed prior to the publication of the allegedly libelous statement; and

(3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.[13]

Applying the above analysis to Dr. Romano, we conclude that he was a public figure for the limited purpose of discussion about the changes to public health care insurance programs and doctors' responses to them. Clearly, . . . the subjects of state-funded health care and the legislative enactment of the Omnibus Health Care Act of 1989 were matters of substantial public controversy in existence prior to the publication of the allegedly defamatory statements at issue here. In the first section of the Act, the Legislature recognized the uncertain financial stability of the various state-funded insurance programs and proposed methods by which cost savings measures could alleviate this problematic situation. See W. Va.Code, 16-29D-1(a) (1989). Passage of the Act generated public protests by both the medical community and public employees' groups.

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[11]The words "debate" and "controversy" should be read liberally here; in using them, we do not mean to confine the contexts in which an individual can become a limited purpose public figure to those in which the public is divided about the topic of discussion. For example, an individual could become a public figure by crusading against crack cocaine usage or in support of clean government. Those are not (we hope) controversial stands, but they are nevertheless subjects of public interest and concern. . . .

[12]As we develop below, "public" debate or controversy does not encompass all matters that might happen to interest the public. A plaintiff's involvement in a private dispute would not necessarily convert him or her into a public figure, even if that dispute provoked considerable public curiosity and coverage. Time, Inc. v. Firestone, 424 U.S. 448 (1976) (litigant in spectacular and widely-reported divorce proceeding was not involved in "public controversy").

[13]This analysis is substantially similar to that adopted by the Fourth Circuit in Foretich and Reuber, except we do not think that the defendant must necessarily show the plaintiff assumed "a role of special prominence in the public controversy." [Foretich.] As we see it, prominence is certainly relevant to the determination of whether the plaintiff had access to communication channels--the greater one's prominence, the greater one's access--but we do not believe it is essential to securing an opportunity to make an effective response. (Generally speaking, the connection between prominence and access is diminished in a case like this one, where the alleged defamation remained localized.) In addition, prominence is relevant to the voluntariness prong, but we believe Gertz meant it to be an alternative basis for establishing public figure status. That is, an individual may assume a position of prominence that would make him a public figure for all purposes . . . or that would inevitably give him a seat of importance in the discussion about a particular matter of public controversy or interest. . . .

Consequently, a public controversy existed, "the outcome of which affect[ed] the general public or some segment of it in an appreciable way." . . . Nor can there be any question that the "controversy" was "public," as that term was used in Gertz and its progeny. . . . The changes made to the PEIA and their impact on physicians and their patients were matters of considerable and legitimate public interest and debate.

It is clear, too, that Dr. Romano voluntarily thrust himself into the debate and sought to influence its outcome. Indeed, he was aggressively involved. The quantity of his letter writing to newspapers, professional journals and organizations, fellow physicians, and government officials regarding the controversy was impressive and demonstrated an active engagement in the PEIA controversy. Indeed, the record contains at least fifty examples of such correspondence. In these letters, Dr. Romano set forth his views regarding state-funded health care, his perception of the oppressive restrictions imposed by the West Virginia Omnibus Health Care Act and federal Medicare regulations, explained his reasons for withdrawing from these programs, and frequently exhorted others to join his protest. . . . Dr. Romano worked at the front to rally others, most notably physicians, to join and contribute to the assault on the legislative changes. For example, in a July 10, 1990, letter to the West Virginia Medical Journal, Dr. Romano wrote:

> "We physicians in West Virginia need to stand up and be counted. We need to tell the State of West Virginia that what they [sic] are [sic] doing is unfair and, quite frankly, smacks of tyranny and oppression. I cannot force the State of West Virginia to pay for the medical care of my patients, but what I can do is force the State of West Virginia to acknowledge that this is still the United States of America and we physicians should be treated with respect and should not be relegated to a second or third class citizen status simply because we practice medicine. We all can make a difference; however; [sic] we have to do it by working through our individual patients. Working through the legislators have [sic] proven to be less than ideal to say the least. I think we need more grass root [sic] support. We need to be more political in our offices and to stand up for our rights. This is a perfect time to be political as many as [sic] our colleagues are leaving the state [sic]. We should point out this to our patients. We should be very vocal in our community and civic groups and, if necessary, write letters to our local papers showing exactly what the Omnibus Health Care Act of 1989 has meant to the State thusfar [sic]." . . .

We also think it is pertinent that the very act that prompted Dr. Romano's inclusion in the OCEA's advertisement was done, at least in part, as an act of protest. When he informed Erisco (the agency that then administered the public employees insurance plan for PEIA) that he would no longer see PEIA patients, he expressly connected his decision "to the recent State Legislature's actions." . . . More to the point, in another letter to the Medical Journal, dated November 8, 1989, Dr. Romano stated,

> "I personally do not participate with the new State program because I feel that it unfairly discriminates against doctors in West Virginia. It also tries to solve a very complicated problem in a simplistic and totalitarian manner. . . ." . . .

. . . [I]n a letter to the West Virginia State Medical Association on September 14, 1989, Dr. Romano wrote:

> "I will never voluntarily agree to the provisions of the 1989 Omnibus Health Care Act [sic] and I have opted out of the system. I no longer participate in West Virginia state insurance plans. I feel that this is my right as an independent practitioner who has never been subsidized by the State of West Virginia and therefore should not be subject to some of the ridiculous provisions of this law.... The legislators should be ashamed of themselves for passing such a poor piece of legislation as the Omnibus Health Care Act. I hope they come to their senses and repeal it." . . .

Romano also asked the Association to show his letter and a copy of his curriculum vitae to the state's legislators. [On] October 5, 1989, Dr. Romano wrote to David Lambert, General Counsel of the PEIA:

> "I have sent two letters to Sally Richardson, the Director of the PEIA [sic] stating that I will not

participate with the PEIA in the future. I outlined in both my letters that I felt that the Omnibus Health Care Act was a bad law and that since I disagree with its provisions and since I have the option to opt out of the system, I choose the latter action."

Dr. Romano took, in his mind, a principled stand. But when a citizen commits a controversial act to protest a governmental decision, he should not be surprised when that act becomes a matter of public attention and criticism. Similarly, we can applaud Dr. Romano for his participation in the public discussion on an issue of major importance and for his bold, blunt, and tireless efforts to get his point across. Such efforts, however, do not come without public notoriety that can translate into public figure status for purposes of that discussion. Based on the combination of the quantity and vigor of his efforts to influence the debate, on his attempts to lead others into the debate, and on the close connection between his act of protest in opting out of the PEIA and the allegedly libelous statements, we conclude that Dr. Romano's participation in this public controversy was significant enough to render him a public figure for purposes of that debate.

The only remaining inquiry in the public figure analysis is to determine whether Dr. Romano had reasonable access to communication channels that would permit him to make an effective response to the statements in question. In analyzing this factor, we deem it important to consider the particular forum in which the allegedly libelous charge occurred. That is, the channels for "effectively" responding to an advertisement and story in the Wheeling News Register would be quite different from those needed to rebut a charge on "20/20." . . .

We think the relators have established that Dr. Romano had ample means to respond. He certainly demonstrated his ability to write letters, including letters to the media, and to get at least some of them published. Most significantly, Dr. Romano either did respond, or could have responded, in the very same forum--local newspapers--that was used to make the allegedly libelous charge against him. He wrote a letter to the Wheeling Intelligencer complaining about the OCEA ad and giving his response, and the letter was published. And the record indicates no reason why Dr. Romano could not have responded to the OCEA ad by purchasing his own ad.[17] We conclude that Dr. Romano had access to effective outlets to set the record straight for the audience, local newspaper readers, that was exposed to the advertisement and article about which he complained.

Accordingly, we hold that Dr. Romano was a public figure for purposes of discussion about State-funded medical insurance programs and the legislative changes made to them in 1989.

C. Elements of Defamation Action

Because Dr. Romano was a limited purpose public figure, the appropriate test for defamation is set forth in Syllabus Point 4 of [Long v. Egnor]:

"'[A] public official ... can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.' Syllabus Point 1, in part, Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674 [(1975)]."

As we explain below, Dr. Romano's claim cannot meet the first and third requirements.

1. The Advertisement

Dr. Romano conceded that he withdrew from the state insurance programs, but nevertheless insists that the advertisement was false because he continued to treat state insured patients on a private

[17]Although it is relevant that the Wheeling News Register did not contact Dr. Romano for his response to the OCEA when it ran the follow-up story, we do not think that fact can be controlling. The issue is not whether Dr. Romano had an opportunity to respond in the same article; the issue is whether he had an effective opportunity to rebut the charges in the same market. As the text shows, he plainly did.

basis; he was willing to treat PEIA members who would agree to forego their insurance and pay him directly. We conclude, however, that the OCEA's accusation was substantially true and was, therefore, protected speech. As the Supreme Court stated in Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17 (1991):

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication.... It overlooks minor inaccuracies and concentrates upon substantial truth.... Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'[”] . . .

In this case, the question is whether the reader would have formed a different opinion of the plaintiff if, instead of reading, "Your children's teachers and their families have been denied health services by [Dr. Romano]," the advertisement had stated, "Your children's teachers and their families have been denied health services by [Dr. Romano] unless they were willing and able to forego their state medical insurance and pay him out of their own pockets." If the two statements create a different impression of Dr. Romano, the difference escapes us. Read in context, both statements accuse him of refusing to treat teachers because of the source of their health insurance. The omitted fact--that he treats teachers who pay him personally--does not diminish the allegation because it does not alter the fact that he was still doing what he was accused of doing. To draw an analogy, if the ad read, "Teacher Smith uses corporal punishment on your children," Mr. Smith could not establish falsity by proving that there were some students in his class that escaped his rod. Similarly, Dr. Romano cannot prove the error of the advertisement in this case with evidence that he served self-paying teachers.

Additionally, we cannot ignore the common sense conclusion that, if patients are told that their doctor will no longer accept their insurance and that they must pay him out of their own pockets, the overwhelming majority of such patients will look for another doctor or go without the sought-for service. Certainly, for many, if not most, state and educational employees, a doctor's refusal to accept the insurance payment is tantamount to a refusal to provide medical services. Indeed, when Dr. Romano wrote to Erisco to give notice that he was opting out of the PEIA plan, he stated:

> "It is my unpleasant task to inform you that I can no longer see West Virginia State Employee insurance patients. Due to the recent State Legislature's actions, I find that working under the system they [sic] have [sic] established is intolerable and, therefore, I will be discharging my patients that I have under Erisco.
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> "To be fair I will give them prescriptions and medications up to one month's supply. This should give them ample time to find another doctor of their choice." . . .

It is difficult to fault the relators for their failure to specify that Dr. Romano still served patients who personally pay for his services when the doctor did not always make the distinction himself. Moreover, we note that the advertisement did not necessarily preclude the possibility that some teachers were continuing to receive health services from the listed doctors. It merely said teachers "have been denied services" by the physicians. It thus left open the possibility that some teachers were being, or would be, provided with treatment by those doctors. And Dr. Romano does not deny that he refused to treat at least some teachers.

Furthermore, even if the ad's omission rose to the level of a substantial falsehood, the record provides no support, let alone clear and convincing proof, for a finding of actual malice. The ad was based entirely on information provided by PEIA, which stated that certain doctors had withdrawn from the PEIA plan. The OCEA fairly deduced from the release (reached the common sense conclusion we noted above) that the listed doctors were not treating OCEA members and their families. The governmental release did not indicate that deduction was false, and there is nothing in the record to suggest that the OCEA had any other information that would have put it on notice that its charge might not be completely accurate or that the non-PEIA-participating physicians were, in fact, treating PEIA insureds.

Certainly, no evidence sustains the conclusion that the OCEA either knew of any inaccuracy or

made the statement with a "high degree of awareness of [its] probable falsity." . . . "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." . . . We can concede to the doctor his contention that the OCEA intended to embarrass him and damage his reputation. But that does not mean the charge was made with actual malice.[18] An intent to inflict harm is not actual malice; rather, a plaintiff must prove, by clear and convincing proof, an "intent to inflict harm through falsehood." ... Thus, we hold, in the alternative, that the advertisement was protected because it was substantially true and that, if and to the extent it created a false impression, the statement was within the actual malice privilege.

2. The News Story

The alleged libel in the follow-up news story was Suriano's statement, "Certain public employees need to know who is not treating them now[.] We felt that the teachers needed to know that. Maybe this will shake those doctors up [.] They should honor their professional code. We would not turn away one of their children." The first sentence basically repeats the advertisement and was, for reasons we stated above, substantially true and privileged. The second sentence simply recites Suriano's belief as to the OCEA's obligations to its members and makes no reference, explicit or implied, to anyone else. The third sentence states the purpose of the advertisement--"to shake those doctors up." The last sentence refers to the OCEA members' sense of their duty. To the extent it might have implied the doctors were "turning away" patients, it, too, was substantially true and privileged. None of those statements can, standing alone, support a defamation claim.

If Romano has a claim, then, it must rest on the fourth sentence. Read literally, "They [i.e., 'those doctors'] should honor their professional code," accuses no one of anything; it merely states a noncontroversial, nondefamatory belief about what the doctors should do, not what they did. On the other hand, the sentence can also be read to imply that "those doctors"--those who had opted out of the PEIA--were not, in doing so, honoring their professional code. Whether that is actionable, we think, turns on the word "code". If the statement is read as saying merely that Dr. Romano and the other doctors violated a general professional duty by refusing to serve certain patients who come to them simply because of the source of their insurance, the statement is not provably false. If the statement cannot be proved to be a falsehood, then Dr. Romano could not establish a crucial element (falsity) of his libel claim. Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"[;] Syl. Pt. 4, Maynard v. Daily Gazette Co., 191 W.Va. 601, 447 S.E.2d 293 (1994) ("[a] statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection"); Hinerman v. Daily Gazette Co., Inc., 188 W.Va. 157, 174, 423 S.E.2d 560, 577 (1992), cert. denied, 507 U.S. 960 (1993) ("[u]nless an opinion, no matter how scurrilous, implies undisclosed defamatory facts, we protect it. Sharp, vituperative and biting criticism are at the heart of free debate[.]" . . .

Obviously, Dr. Romano felt that the State had unfairly dumped the PEIA fiscal problems on doctors and that that injustice warranted, even compelled, what in his mind was a principled refusal to treat patients relying on PEIA insurance. That is not an unreasonable perception. Nor is it unreasonable, however, for the OCEA and Mr. Suriano to believe that it is unethical for doctors to put their personal or political interests above the health interests of their patients and that refusing to treat patients for personal or political self-interest is of the same order as refusing to treat patients because they are black, Jewish, or Norwegian. The point is that no jury can say which of these views is the "true" one; truth here lies in the indeterminate sphere of ethical beliefs. As with

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[18]An intent to injure, however, would be relevant. Such intent could make it more likely that the speaker intentionally lied or recklessly disregarded the truth, if falsehood is established. The intent could also be relevant to damages issues.

aesthetics, we can argue over them all we want, but there is no way to choose, as a matter of legal factfinding, the right or wrong belief. . . .

A third reading of the key sentence, however, offers Dr. Romano hope. By that reading, the statement implies that Dr. Romano and the others did not simply violate some general ethical standard--about which there can be no finality--but that they violated some specific provision of the code regulating physicians. That reading does render a statement that is provably true or provably false. Indeed, we have a Board of Medicine whose charge is to hold hearings and make determinations about whether a doctor has violated some provision or other of the Medical Practice Act. . . .

This case, then, really comes down to the issue of whether that third reading is sufficiently reasonable as to create an issue for the jury. After careful consideration, and keeping in mind the responsibility that judges have in making mixed fact-law determinations in cases that embrace the freedoms of expression, Bose, supra, we conclude that the statement does not justify putting the parties through the expense of a trial. The statement must be read in context. It comes from a lay person who is speaking spontaneously and in general terms. He does not identify what code he is referring to, makes no reference to any specific provision, and does not contend that the doctors should be disciplined, which is the consequence of violating W. Va.Code, 30- 3-14 (1989), of the Medical Practice Act (the "law" regulating physicians' conduct). The clear implication is that Mr. Suriano believed doctors have a moral duty, not a legally compelled one, to serve patients regardless of the source of their insurance. We will not permit imposition of damages on either the OCEA or Mr. Suriano for expressing that opinion while engaged in candid, if acerbic, discussion about an issue of vital public importance. The statement was, simply put, part of the rhetoric of free and open debate....

III.

CONCLUSION

This is a classic case of a public controversy producing expression of a vibrant, but astringent, character. All of the players in this litigation participated in that debate and exposed themselves to sharp counterattacks. The market provided the players with ample opportunity to vindicate their respective positions. Although neither the First Amendment of the United States Constitution nor Article III, Section 7 of the West Virginia Constitution requires that participants in public debate must endure intentional or reckless falsehoods aimed at their reputations, those provisions do require that the debaters must steel themselves to harsh criticism that does not exceed the actual malice privilege. Dr. Romano's remedy in this case for any injury he might have suffered because of the relators' speech is limited to using the communication channels provided by the market to rebut whatever charges were leveled against him.

For the reasons stated above, we conclude that a writ of prohibition shall issue prohibiting further proceedings in the underlying civil action for libel. . . .

NOTE ON LIBEL CASES AFTER *SURIANO*

Two high profile defamation actions have reached the Supreme Court recently, and in each, the Court reversed summary judgments for defendants and remanded the cases for trial.

In *Pritt v. The Republican National Committee*, 210 W.Va. 446, 557 S.E.2d 853 (2001), 1996 Democratic gubernatorial nominee Charlotte Pritt alleged that the defendants had defamed her in radio and television ads that were widely and frequently broadcast near the end of Pritt's ultimately unsuccessful campaign. The ads stated that Pritt, while in the State Legislature, had (among other things) "proposed teaching first graders about condoms" and had voted "to permit the sale of pornographic videos to children," "to allow convicted drug abusers to work in our public schools," and "against honoring the men and women of West Virginia who fought in the Gulf War." The trial court had found on summary judgment motion that the statements were neither false nor published

with actual malice. Without describing any of Pritt's evidence that could rebut the lower court's conclusions, the Supreme Court reversed, holding that there were "genuine issues of material fact so as to necessitate the presentation of this case to a jury." The opinion includes a summary of the Court's doctrines regarding defamation claims brought by a public official / public figure. On remand, Pritt lost her claim before the jury.

Two years later the Court returned to the libel area in *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 588 S.E.2d 197 2003), to determine if a star high school athlete was a public figure for purposes of his defamation claim. The athlete in the case was Quincy Wilson, later a standout running back at West Virginia University. At the time of the alleged defamation, however, Quincy was a senior at Weir High School. He had, by then, been named a co-winner of the Kennedy Award as the State's most outstanding football player, had played on his school's state championship basketball team, and had signed a letter of intent to play at W.V.U. After their dramatic win in the championship basketball game, Wilson and his teammates engaged in what some people thought were excessive celebrations in front of their opponents' fans. Rumors spread that Wilson exposed himself during these antics. The next day's Charleston Gazette ran two stories reporting that there were "allegations" Wilson had done so and that the police were investigating the incident.

After determining that a libel plaintiff's status as a public figure is a question of law for the court to decide, Justice Davis's opinion for the three-justice majority found that Wilson did not fall into any of the public figure classes. "All purpose public figure" is a narrowly defined category that requires "clear evidence of the plaintiff's general fame or notoriety in the state, and pervasive involvement in the affairs of society. In determining whether a plaintiff is an all-purpose public figure, a trial court may consider (1) statistical survey data concerning the plaintiff's name recognition; (2) evidence of previous coverage of the plaintiff by the media; (3) evidence that others alter or reevaluate their conduct or ideas in light of the plaintiff's actions; and (4) any other relevant evidence." Davis emphasized that the relevant facts are those that existed at the time the alleged defamation occurred and where (meaning the particular medium) it occurred. Applying those standards, the Gazette's proof failed to establish that Wilson was an all-purpose public figure. He may have gained prominence in high school athletics, but he did not "'occup[y] a position of such "persuasive power and influence" that he could be deemed one of that small group of individuals who are public figures for all purposes.'"

Nor was Quincy a limited purpose public figure. He had done nothing, *"prior* to the publication of the Gazette's articles," to inject himself into any controversy regarding sportsmanship (emphasis in original). Indeed, there had not even been a pre-defamation controversy on sportsmanship. The Court rejected the argument that his voluntary decision to play high school athletics could provide the type of volition needed to make Wilson a limited purpose public figure, even for the purposes of conduct related to high school athletics.

Finally, Davis ruled that Wilson could not be labeled an involuntary public figure. To establish him as such, the defendant would have to "demonstrate by clear evidence that (1) the plaintiff has become a central figure in a significant public controversy, (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter, and (3) the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere." Because the record could not support a finding that Wilson had been a "central figure" in any controversy, he could not be an involuntary public figure.

Justice McGraw, joined by Justice Albright, dissented. He believed that "society" had made high school athletes like Wilson into public figures.

NOTE ON OBSCENITY LAW

[From ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 89-90 (2nd ed.,

Oxford University Press, 2016).]

Section 7 authorizes the Legislature to restrain publication and distribution of obscene materials. Although West Virginia does not presently have a statewide ban on obscenity, West Virginia Code 7-1-4 authorizes cities and county commissions to enact local ordinances forbidding its distribution, West Virginia Code 61-8A-1, et seq., prohibits its sale to minors, and West Virginia Code 61-8C-1, et seq., outlaws the filming and distribution of child pornography.

The West Virginia Supreme Court of Appeals has not expressly defined "obscenity" as used in § 7, but it has applied the federal standard under the First Amendment. Butler v. Tucker (1992). That definition includes three parts:

(1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(2) the average person, applying contemporary community standards, would find the work depicts or describes, in a patently offensive way, sexual conduct specifically listed by state law;

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Both 7-1-4 and 61-8A-1 of the West Virginia Code use the above standard, except they authorize the value of the work to be assessed by the average person applying contemporary community standards. Although the West Virginia Court has upheld the constitutionality of § 7-1-4, *Butler v. Tucker* (1992), a federal district court has concluded that the law is inconsistent with the United States Supreme Court holding in *Pope v. Illinois* (1987). *Pride, Inc. v. Wood County* (U.S.D.C. 1993). Pope said that the value of the work is a mixed question of law and fact and must be judged by a uniform, objective standard, rather than by community values.

The child pornography laws in West Virginia Code 61-8C-1, et seq., which ban the making and distribution of photographs or films of minors engaged in sexually explicit conduct, are clearly constitutional. *E.g., New York v. Ferber* (U.S. 1982).

NOTE ON OFFENSIVE SPEECH

Offensive speech is an umbrella category for describing insulting or "fighting" words, cursing, sexually explicit but not obscene speech, and statements that offend because of their content. The State may punish or provide civil recovery for speech directed personally at an individual if it were intended to provoke an immediate violent response or breach of the peace. *Mauck v. City of Martinsburg* (1981). Epithets and racial slurs are common examples. Although the State cannot take specified words, such as obscenities, out of circulation by making their use criminal, the particular context of the speech may allow some regulation and even censorship. For example, a public school teacher could be disciplined for using offensive language in the classroom. *See DeVito v. Board of Educ.* (1984).

In its only significant opinion on offensive speech, the West Virginia Supreme Court narrowly interpreted the insulting words statute in West Virginia Code 55-7-2 to avoid conflict with § 7 and the First Amendment. Mauck. The statute provides:

All words which, from their construction and common acceptation, are construed as insults and tend to violence and breach of the peace, shall be actionable.

The law came from an 1810 Virginia statute described as an anti-dueling measure. As the Court recognized, "Since no reasonable society, even the one existing in courtly Virginia in 1810, could possibly have contemplated the degree of hypocrisy and irony which an expansive reading of our insulting words statute would invite, it is necessary to give the statute a reasonable construction." Mauck v. City of Martinsburg, 167 W. Va. 332, 335, 280 S.E.2d 216, 219 (1981). Accordingly, the cause of action was limited to two types of speech: (1) false insults, that are neither privileged by the common law or the Constitution, nor communicated to anyone but the victim; and (2) insulting words that tend to provoke violence and breach of the peace. [For an example of the latter, see

Covey v. Fields (1987).]

NOTE ON COMMERCIAL SPEECH

In *State ex rel. McGraw v. Imperial Marketing*, 196 W.Va 346, 472 S.E.2d 792 (1996), the Court considered the constitutionality of an injunction under the Consumer Credit and Protection Act and the Prizes and Gifts Act against certain practices by Suarez Corporation Industries ("SCI"), a direct mail retailer. According to the lower court's findings, the merchant had deceived and misled consumers by convincing them that they had won a prize or gift "when, in reality, the award of the prize or gift was an illusion and nothing more than an elaborate ruse to sell SCI's product." SCI protested that the injunction violated its rights of free speech. Following federal precedent, the Supreme Court of Appeals held that advertising does enjoy constitutional protection, but that protection is limited by the analysis in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980), as modified by *Board of Trustees v. Fox*, 492 U.S. 469 (1989). Under Central Hudson, the constitutionality of any regulation of commercial speech is determined by subjecting the restriction to a four-part test:

(1) Whether the speech at issue is protected speech (the speech is not protected if it is false or misleading or if it relates to an unlawful activity);
(2) Whether the State has a substantial interest in restricting the speech;
(3) Whether the restriction directly advances the substantial state interest; and
(4) Whether the restriction is reasonably necessary to accomplish the substantial interest.

To regulate commercial speech, the State must produce a positive answer to each of steps one through four. The fourth step, according to Fox, does not require the State to show that its means are the least restrictive to accomplishing its end, but only that there is a reasonable fit between the regulation and the substantial state interest.

Applying *Central Hudson* to the injunction against SCI's practices, the Court had it easy:

"[W]e agree with the circuit court's findings that [the defendant's] solicitations . . . were misleading and deceptive. We therefore need to go no farther in our analysis since upon the finding of deceptive solicitation there is nothing within the communications between SCI and the targeted West Virginia consumer which is protected under the [Constitution]."

The Court further held that the prior restraint doctrine, which provides that courts and administrative agencies may not direct orders against speech prior to its dissemination, does not apply to false and misleading advertising.

2. Expressive Conduct

STATE v. BERRILL,
196 W. Va. 578, 474 S.E.2d 508 (1996).

ALBRIGHT, Justice

This appeal is from an order of the Circuit Court of Calhoun County, which denied defendant's petition appealing magistrate court jury convictions of disrupting a public meeting in violation of W.Va. Code § 61-6-19 and wearing a mask in public in violation of W.Va. Code § 61-6-22. Appellant, defendant below, first argues that W.Va. Code §§ 61-6-19 and 61-6-22 were unconstitutionally applied to him, in violation of his rights to petition and to freedom of speech under the First Amendment of the United States Constitution and Article III, §§ 7 and 16 of the West Virginia Constitution. . . . We find that W.Va. Code §§ 61-6-19 and 61-6-22 were constitutionally applied to appellant and, therefore, affirm the convictions. . . .

In an effort to convince the Calhoun County Board of Education (Board) to change the Calhoun

County High School red devil mascot, Thomas Berrill, appellant, went to a Calhoun County Board meeting dressed in a devil costume. The costume included a mask that covered his face. Prior to the meeting, Mr. Berrill called the Board and asked to be placed on the meeting agenda under the fictitious name of "Mr. DeVille". He did not inform the Board of his true identity nor of his plan to dress in a devil costume. The meeting was held at the Board office, which is owned by the Board, in a room that had only one means of exit, an interior door leading to another part of the building. Although the agenda for the Board meeting provided a time for public questions and comments, Mr. Berrill did not await that opportunity. Rather, when Mr. Berrill entered the meeting, he took advantage of a pause in the proceedings, a short period of silence, to begin his conduct and remarks. The evidence discloses that Mr. Berrill moved or "pranced" about the room and began to speak although he was not called on by the moderator to do so. Mr. Berrill then addressed the gathering for a period estimated by witnesses to range from one-and-a-half to ten minutes, during which time the regular business of the meeting came to a halt. Although Mr. Berrill used no threatening words and had no physical contact with anyone at the meeting, he ignored instructions to take a seat or leave and was at least twice called out of order by the moderator. In his statement to the assembly, Mr. Berrill represented that he was the red devil and thanked the Board for keeping the devil in the schools and keeping God out. Mr. Berrill departed from the meeting room only when the Board president stood up and moved toward Mr. Berrill.

Appellant was charged in the Magistrate Court of Calhoun County with one count of violating W. Va. Code § 61-6-19 . . . for wilfully disrupting a public meeting and one count of violating W. Va. Code § 61-6-22 (hereinafter "the anti-mask statute")[3] for wearing a mask in a public building. During trial, witnesses for the State who were present at the meeting testified that they were frightened during the incident, essentially because they did not know what was happening, who defendant was, or whether he would become violent. The witnesses also stated that they were concerned for the safety of the children who were present at the meeting. . . . Mr. Berrill was found

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[3]West Virginia Code § 61-6-22 (1992) states:

(a) Except as otherwise provided in this section, no person, whether in a motor vehicle or otherwise, while wearing any mask, hood or device whereby any portion of the face is so covered as to conceal the identity of the wearer, may:

(1) Come into or appear upon any walk, alley, street, road, highway or other thoroughfare dedicated to public use;

(2) Come into or appear in any trading area, concourse, waiting room, lobby or foyer open to, used by or frequented by the general public;

(3) Come into or appear upon or within any of the grounds or buildings owned, leased, maintained or operated by the state or any political subdivision thereof;

(4) Ask, request, or demand entrance or admission to the premises, enclosure, dwelling or place of business of any other person within this state; or

(5) Attend or participate in any meeting upon private property of another unless written permission for such meeting has first been obtained from the owner or occupant thereof.

(b) The provisions of this section do not apply to any person:

(1) Under sixteen years of age;

(2) Wearing a traditional holiday costume;

(3) Engaged in a trade or employment where a mask, hood or device is worn for the purpose of ensuring the physical safety of the wearer;

(4) Using a mask, hood or device in theatrical productions, including use in mardi gras celebrations or similar masquerade balls;

(5) Wearing a mask, hood or device prescribed for civil defense drills, exercises or emergencies; or

(6) Wearing a mask, hood or device for the sole purpose of protection from the elements or while participating in a winter sport.

(c) Any person who violates any provision of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than one year, or both fined and imprisoned.

guilty of both charges by a petit jury in the magistrate court. . . .

RIGHT TO PETITION
AND FREEDOM OF SPEECH

Mr. Berrill . . . challenges his conviction on the grounds that it violates his right to petition for a redress of grievances and his right to freedom of speech as provided under the First Amendment to the United States Constitution, and Article III, §§ 7 and 16 of the West Virginia Constitution.

[See Section A-4, infra, for discussion of Mr. Berrill's argument that the anti-disruption statute violated his right to petition.]

. . . [U]nder the tests established in United States v. O'Brien, 391 U.S. 367, 377 (1968)[,] "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."...

We turn [to] the anti-mask statute, utilizing . . . the O'Brien analysis. The government interest implicated in our anti-mask statute can be ascertained from its plain language. . . . The obvious governmental interest here is the protection of citizens from violence and from the fear and intimidation of being confronted by someone whom they cannot identify.[9] As the Georgia Supreme Court observed in State v. Miller, 260 Ga. 669, 398 S.E.2d 547, 550 (Ga. 1990):

> We know that "public disguise is a particularly effective means of committing crimes of violence and intimidation. From the beginning of time the mask or hood has been the criminal's dress. It conceals evidence, hinders apprehension and calms the criminal's inward cowardly fear." . . . A nameless, faceless figure strikes terror in the human heart. But, remove the mask, and the nightmarish form is reduced to its true dimensions. The face betrays not only identity, but also human frailty.

Moreover, under the plain language of the statute, it does not matter what message, if any, is to be conveyed by wearing a mask. The focus, as appellant has conceded, is on the concealment of identity, and any limitation on speech is merely a secondary effect. Thus, the anti-mask statute plainly "seeks to proscribe conduct, not free speech," and ". . . that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . ." [*Id., quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).]

We find further that any restriction on Mr. Berrill's constitutionally protected freedoms was minimal. The anti-mask statute did not prevent Mr. Berrill from delivering his message. As we previously mentioned, he had already addressed the Board on the same issue the previous fall. Moreover, the statute did not prevent Mr. Berrill from demonstrating his perception of the evil appearance of the devil, as long as he did not conceal his identity while doing so. Obviously, Mr. Berrill had alternate methods of demonstrating and articulating his concerns that would not have concealed his identity and thus violated the statute under consideration.

An amicus curiae brief filed in this appeal raises, among other matters, a series of cases which protected anonymous writings and anonymous membership in organizations.[11] We find that none of these cases implicate the government's interest in public order and safety in the manner and scope of the two statutes herein involved.

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[9]We note that a number of states have enacted similar statutes. We perceive that a principal motivation for such legislation relates to historical and largely cultural phenomena which were considered to endanger the peace and domestic security of communities by reason of violence or the threat of violence executed through more or less secret societies whose members' identities have been regularly obscured by the use of costumes and masks. . . .

[11]McIntyre v. Ohio Elections Commission, __ U.S.__, 115 S. Ct. 1511 (1995); American Communications Assoc. v. Douds, 339 U.S. 382 (1950); NAACP v. Alabama, 357 U.S. 449 (1958); Talley v. California, 362 U.S. 60 (1960)[.]

Additionally, we note that there is a clear nexus between the government's interest and Mr. Berrill's activity. Our review of the record reveals that the people who attended the meeting were frightened by Mr. Berrill's behavior. They were worried that Mr. Berrill would become violent, and they were concerned for their own safety, as well as the safety of the children present. Certainly, these people would not have suffered such fear and intimidation if they had known the identity of the person portraying the devil before them. Therefore, we find W.Va. Code § 61-6-22 was constitutional as applied to Mr. Berrill.

We reject Mr. Berrill's arguments for an additional, persuasive reason. "It is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). We have considered whether Mr. Berrill has met his burden of demonstrating that his conduct at the Board meeting "constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction." Texas v. Johnson, 491 U.S. 397, 403 (1989). To answer this question, we have considered whether Mr. Berrill has demonstrated that "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam). Having reviewed the record in this case, we find that Mr. Berrill may have demonstrated an intent to convey a particularized message, but he has failed to show a likelihood that his message would be understood. Indeed, the record clearly demonstrates that his intended message was completely misunderstood. . . .

Mr. Berrill asserts that he employed the devil costume in an effort to draw attention to his cause. He contends that the mask was not intended to conceal his identity, but was a critical part of his message, the purpose of which was to graphically portray the image he felt the mascot represented. He asserts that "the mask was intended to conjure the horrific image of the master of hell, as distinguished from the almost cherubic aspect of the actual mascot."

In the surrounding circumstances, it appears that Mr. Berrill's conduct resulted more in chaos than understanding. The surrounding circumstances to which we refer include Mr. Berrill's entrance into a public meeting while dressed as a devil with his identity concealed; his address to the assembly at a time when the public had not yet been invited to speak; his having moved or "pranced" around the room; and, with his speech and his refusal to cease and desist, having disrupted the orderly process of the meeting. We further refer to the circumstance that the room had but one exit, to an interior area of the building, likely inhibiting exit from the room by the assembly had violence occurred. Finally, we note that there were children present, which created additional uneasiness and concern on the part of the adults.

Our view that Mr. Berrill's conduct was more likely to create confusion than convey an understandable message under the circumstances is further supported by testimony presented at trial, which tended to indicate that the audience was preoccupied with evaluating the potential danger of the situation. Of the four State witnesses who testified about the meeting, two indicated their concern that the man dressed as a devil might have been carrying a gun, and three stated that they were concerned about the safety of the children who were present. All four of the witnesses expressed that they did not know what to expect and that they were concerned that the situation may become violent. Additionally, one witness specifically stated that she was so scared that she did not listen to much of what Mr. Berrill said. We conclude that Mr. Berrill has failed to demonstrate that his conduct was likely to be understood by those present as expressive of the message he wished to convey. Rather, it appears to have generated, at the very least, uncertainty as to Mr. Berrill's identity, concern for the safety of children, some fear of violence, and concern for the safety of those who might wish to exit the room in case violence occurred. Accordingly, we hold that neither the First Amendment to the Constitution of the United States nor §§ 7 and 16 of the West Virginia Constitution preclude the prosecution of the defendant under the W.Va. Code § 61-6-22....

3. Rights in the Public Forum

WEST VIRGINIA CITIZENS ACTION GROUP, INC., v. DALEY, 174 W.Va. 299, 324 S.E.2d 713 (1984).

McGRAW, Justice:

The petitioners in this mandamus proceeding, the West Virginia Citizens Action Group, Inc., a nonprofit corporation dedicated to the advocacy of consumer and citizen issues before various governmental entities, and Scott Walker, its director of canvassing for northern West Virginia, challenge the constitutionality of Fairmont ordinance 711.12, governing the issuance of solicitation permits, which provides, in pertinent part, that "The effective hours of the charitable solicitation permit shall be between 9:00 a.m. and sunset. Solicitations shall be prohibited during other hours," based upon the free speech doctrines of vagueness and overbreadth. . . .

II

Following a line of cases beginning with the United States Supreme Court's seminal decision in Schneider v. State, 308 U.S. 147 (1939), reversing the conviction of a Jehovah's Witness who was convicted for violating an ordinance which required canvassers and solicitors to obtain a written permit from the chief of police who possessed practically unbridled discretion in awarding such permits, and ending with the Court's most recent decision in Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), invalidating a Maryland statute prohibiting the solicitation of contributions by charitable organizations whose expenses exceeded 25 percent of the amount received through such fund-raising activities, substantial first amendment protection has been granted door-to-door canvassing and soliciting activities. . . .

In Schneider, [the] Court noted the importance of door-to-door expressive activities: "[P]amphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." . . . In order to finance these "causes of little people," the Court recognized the critical interrelationship between canvassing and solicitation in [Schaumburg,] stating that:

> Prior authorities ... clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money.

This need to accommodate the solicitation of financial support by those advancing the "causes of little people" is particularly pronounced given the protection granted corporations, which possess large accumulations of capital at their disposal to magnify the volume of expression designed to serve their own impersonal social, political, and economic interests, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). See also Anderson's Paving, Inc. v. Hayes, 295 S.E.2d 805 (W.Va.1982).

Finally, we note that the types of advocacy in which the petitioners engage are at the core of the interests protected by constitutional free speech guarantees. As the Court stated in Garrison v. Louisiana, 379 U.S. 64, 74- 75 (1964), "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." . . .

Although protected by constitutional free speech guarantees, door-to-door canvassing and

solicitation are subject to reasonable time, place, and manner restrictions which narrowly serve legitimate governmental interests. In [Hynes v. Mayor of Oradell, 425 U.S. 610, 619 (1976)], the Court identified two legitimate governmental interests which support the regulation of door-to-door canvassing and solicitation activities:

> There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. We cannot say ... that door-to-door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home.

As to the governmental interest in crime prevention served by the regulation of door-to-door canvassing and solicitation, the Court stated in Martin v. Struthers, 319 U.S. 141 (1943), that, "[B]urglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances." As to the governmental interest in the protection of privacy in the home, the Court stated in [Martin], that, "Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit."... Additionally, in [Cantwell v. Connecticut, 310 U.S. 296 (1940)], the Court identified a third justification for the regulation of door-to-door canvassing and solicitation: "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." . . .

III

We must first examine the Fairmont ordinance in light of the petitioners' contention that it is unconstitutionally vague.

The fundamental flaw in the Fairmont ordinance is its failure to define the term "sunset." The lack of clarity with regard to this inherently ambiguous term raises the spectre of both chilling effect and discriminatory enforcement. . . . A fine line drawn through dusk is too slender a thread upon which to hang the exercise of fundamental free speech rights.

IV

In addition to the need for clarity in the time, place and manner regulation of door-to-door canvassing and solicitation, constitutional free speech guarantees also mandate specificity with respect to such regulation. The scope of governmental regulation of protected first amendment activity designed to serve a substantial governmental interest must be "no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). With respect to temporal restrictions on door-to-door canvassing and solicitation, we note that the majority of courts have held that regulations which fail to permit some evening activity are not sufficiently tailored to serve the governmental interests advanced for such restrictions and are therefore unconstitutionally overbroad. . . .

Conversely, in Pennsylvania Alliance for Jobs and Energy v. Council of Borough of Munhall, 743 F.2d 182, 185-88 (3d Cir.1984), the Third Circuit [upheld] various ordinances restricting door-to-door canvassing and solicitation to between the hours of 9:00 a.m. and 5:00 p.m. Monday through Saturday[.] ...

The dissenting opinion . . ., however, found none of the justifications given by the majority sufficient to sustain the constitutionality of the challenged ordinances. First, as to the crime prevention justification, the dissent noted that there was no evidence which supported the majority's conclusions concerning criminal activity related to door-to-door canvassing and solicitation after dark. . . . In fact, the dissent mentioned that the one incident, in which someone posing as a Bible salesman was seen breaking into a house, advanced in support of the correlation between after dark

solicitation, "occurred at noontime," and not after dark. . . . The dissent also remarked, "As the Supreme Court has stated in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969), 'in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the rights to freedom of expression.' ... We live in a dangerous age, to be sure, but safety stripped of the freedom to enjoy its fruits becomes a sad form of solitude." . . . Second, as to the privacy justification, the dissent conceded, "Few would quarrel ... with an ordinance that barred all door-to-door solicitation at three o'clock in the morning." . . . He also noted, however, that "[i]t is unclear at what time the privacy interests that would lead us to sustain that type of ordinance begin to outweigh the first amendment interests of those who desire to solicit in the evening hours...." . . . "I might well, for example, find an ordinance that barred all solicitation after 9 p.m. to be justified by such privacy interests." [As] to the majority's conclusion that ample alternative channels of communication are available which support the validity of the challenged ordinances, the dissent stated:

> [D]oor-to-door solicitation is clearly a unique form of communication in our democracy, one for which few substitutes exist, particularly among those unable to buy their way into the home through purchase of radio or television time or direct mail. When out on the street, the solicitor confronts individuals who are generally engaged in the commerce of the day and unwilling to exchange in any prolonged discussion. Moreover, away from one's "home turf," the average individual may often feel threatened by a stranger coming at him or her and promoting unusual ideas. The public park has similar deficiencies, and is often a poor site for engaging individuals in one-on-one discussions of the ideas of the day. Today's private shopping mall may bar solicitors, . . . and, again, because those in it are generally busy, provides an avenue of communication with limited utility. At all events, the record is barren of evidence of the existence of shopping centers and parks in these towns....
>
> The home, by contrast, has special advantages. Precisely because the homeowner may slam the door in the solicitor's face the moment he or she feels threatened by either the solicitor or his ideas, and precisely because the home is often a place of quiet where the homeowner may have the time to engage in some prolonged discussion, it is a particularly valuable forum for communication. It is of course true, as the majority notes, that the defendant towns have not barred door-to-door solicitation but have merely limited the hours during which it may take place. The question, however, is whether the limitations are too stringent. By eliminating evening solicitation (or even late afternoon solicitation as in Munhall), the ordinances prevent the plaintiff organization from reaching significant segments of the population who are not at home during the day. And while the ability to solicit on Saturday provides some relief from this restriction, it strikes me as inadequate. Restricted to Saturdays, the plaintiff organization, with its finite number of members, may well be unable to reach most of those who are at home on Saturdays but not on weekdays. Many of these same people are at home during the weekday evenings and could be reached if canvassing were allowed on weekdays and evenings. Moreover, many who would be at home during weekday evenings and thus accessible to the plaintiff organization will be away on Saturdays, especially in the summertime.

. . . The dissenter further notes that, according to a study conducted in 1976 by the Research Triangle Institute, the odds of reaching at least one member of a household increases dramatically from 0.39 to 0.57 between 9:00 a.m. and 5:00 p.m. on weekdays to 0.58 to 0.68 between 5:00 p.m. and 10:00 p.m. on weekdays. . . .

We concur with the reasoning of the dissenting opinion in Pennsylvania Alliance . . . and with the majority of courts which have addressed this issue. In our view, the majority opinion in Pennsylvania Alliance placed too great an emphasis upon the "ample alternative channels of communication" standard[.] In effect, the majority in Pennsylvania Alliance utilized the "ample alternative channels of communication" standard to shift the first amendment fulcrum in order to

grant greater leverage to government over those wishing to exercise their fundamental free speech rights. In Schneider [v. New Jersey, 308 U.S. 147, 163 (1939)], involving restrictions on door-to-door canvassing and solicitation, the Court noted, in rejecting a contention that the availability of alternative channels of communication was sufficient to sustain their constitutionality, that, "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

We believe the fatal flaw in the majority opinion in Pennsylvania Alliance is its exclusion from consideration of less restrictive alternatives for advancing the governmental interests served by the temporal regulation of door-to-door canvassing and solicitation activities. . . . Whether explicitly or implicitly, less restrictive alternatives must be considered in order to determine whether the challenged regulation is sufficiently narrow so as not to prohibit that which should be protected. Therefore, we reach a different conclusion under the first amendment with regard to the ordinances upheld in [Pennsylvania Alliance.] Less restrictive alternatives, such as registration and identification procedures; the enforcement of laws criminalizing fraud, burglary, and trespass; and the enforcement of laws requiring compliance with no solicitation signs and requests not to be disturbed, all provide less restrictive means for furthering the legitimate governmental interests in the prevention of crime and the protection of privacy associated with door-to-door canvassing and solicitation. The first amendment cannot exist in a vacuum, without reference to alternative mechanisms for advancing legitimate governmental interests which might impinge upon the exercise of fundamental freedoms of expression, association, assembly, and petition, "[b]ecause First Amendment freedoms needing breathing space to survive...." . . .

We conclude our analysis by noting that even if such a result were not compelled by the first amendment, our state constitutional free speech provisions would certainly compel such a result. [West Virginia Constitution art. III, § 1, 2, 3; Webb v. Fury, 282 S.E.2d 28, 37 n. 4 1981) ("West Virginia's constitutional provisions respecting the right to petition warrant that we give even greater room for activities alleged to be protected by the right....[W]hile the United States Constitution guarantees to the people the right to petition all branches of government, the West Virginia Constitution also gives the people the right to 'reform, alter or abolish' it"); Woodruff v. Board of Trustees of Cabell-Huntington Hospital, 319 S.E.2d 372, 379 (W.Va.1984) ("with respect to the waiver of fundamental constitutional rights, our state constitution is more stringent in its limitation on waiver than is the federal constitution").

In Syllabus Point 7 of Webb v. Fury, this Court held that, "The right to petition involves, among other things, activity designed to influence public sentiment concerning the passage and enforcement of laws as well as appeals for redress made directly to the government." As previously noted, the petitioners' activities serve as catalyst and conduit for the expression of the needs and desires of the public with respect to their governmental institutions. These are precisely the types of activities, protected under our state constitution's expanded right to petition, recognized by this Court in Webb v. Fury.

Accordingly, we hold that restrictions on door-to-door canvassing and solicitation which do not permit some evening activity during the week impermissibly impinge upon the free speech rights of groups and individuals who desire to utilize those modes of expression. We further hold that the failure to define the term "sunset" in an ordinance restricting door-to-door canvassing and solicitation to "between 9:00 a.m. and sunset" renders such ordinance unconstitutionally vague. . . .

STATE EX REL. HECHLER v. CHRISTIAN ACTION NETWORK,
201 W. Va. 71, 491 S.E.2d 618 (1997).

McHUGH, Justice:

The Christian Action Network appeals the December 19, 1995 order of the Circuit Court of Kanawha County which, pursuant to the Solicitation of Charitable Funds Act found in W. Va. Code, 29-19-1 et seq., permanently enjoined the organization from soliciting funds in West Virginia until it conspicuously places the statement mandated by W. Va. Code, 29-19-8 [1992] on all of its public mailings and sends a copy of each of its public mailings to the Secretary of State's office. For reasons explained below, we affirm, in part, and reverse, in part, the December 19, 1995 order of the circuit court.

I.

The Christian Action Network is a Virginia nonprofit corporation which is registered as a lobbyist in both the United States House of Representatives and the United States Senate for the primary purpose of advocating family value issues. More specifically, the Christian Action Network's articles of incorporation state that the organization's purposes are, inter alia:

(a) To educate the general public and to advance the social welfare through the promotion of traditional Judeo-Christian moral values in areas of social concern, including, but not limited to, the advancement of:

(1) freedom of religious beliefs, practices, assembly and autonomy;

(2) sanctity-of-life for the unborn, the mentally and physically handicapped and the hopelessly ill;

(3) traditional interpersonal morality and . . . family values;

(4) a strong national defense; and

(5) fair taxation and elimination of wasteful spending by the Federal government;

(b) To advise the United States Congress and local and state legislative bodies and public officials about, and/or to seek legislation in furtherance of, the topics described in clause (a) above.

(c) To provide educational materials by the use, implementation and production of publications, media presentations, lectures, debates, seminars and workshops in furtherance of the nonprofit purposes of the Corporation[.]

[The circuit court found that] the "Christian Action Network accomplishes the purposes for which it was incorporated by, inter alia, producing video tape programming designed to 'educate citizens around the country regarding [the issue of homosexuals in the United States military]; by publishing a book entitled Defending the American Family, intended to educate Congress, 'key people inside the White House,' and 'the common public,' regarding pro-family Contract With America issues; producing television commercials, for public broadcast, regarding candidate Bill Clinton's position on homosexual issues; placing newspaper ads in large circulation newspapers regarding candidate Clinton's views on homosexuality; publishing a 'government report card' intended 'to help people in their home understand where their member of Congress stands on the issues of [family values, Judeo-Christian values, homosexuality and the like]; [and] circulating petitions to the public intended to encourage various corporations and agencies (e.g., Levi Strauss Corp., the United Way of America) to adopt funding and contribution strategies more amenable to Christian Action Network's views on pro-family, Judeo-Christian, and anti-homosexuality values. . . .

The Christian Action Network funds its lobbying programs by national direct mail solicitations. Indeed, in the three years it has engaged in fundraising in this State, it has collected between $10,000 and $50,000 a year from West Virginia residents. Although the Christian Action Network is exempt from income taxation pursuant to § 501(c)(4) of the Internal Revenue Code[,] any contributions made to it are not tax-deductible, unlike the organizations qualified under § 501(c)(3) of the Internal Revenue Code[.] . . .

Each year since 1992, the Christian Action Network has registered in West Virginia as a charitable organization with the Secretary of the State and has paid a registration fee pursuant to the requirements of the Solicitation of Charitable Funds Act. . . . However, on its 1992 registration form, the Christian Action Network noted that "we are not a charity." Though the later registration forms did not contain this notation, the Christian Action Network left blank the line on the registration forms for amounts "disbursed for charitable purposes." Furthermore, the Christian Action Network

did not include on any of its public mailings the following statement which is mandated by W. Va. Code, 29-19-8 [1992]: "'West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305[;] registration does not imply endorsement[,]'" nor did the Christian Action Network send copies of its solicitation materials to the Secretary of State.

. . . [T]he parties agreed to limit the case to the following three issues:

(1) Is the . . . Christian Action Network a 'charitable organization' as that term is defined in W. Va. Code, § 29-19-2(1)?

(2) If [the] Christian Action Network is a charitable organization, does [the] Christian Action Network have to conspicuously display, on its printed and written solicitations, the disclosure statement contained in W. Va. Code, § 29-19-8? . . .

(3) If [the] Christian Action Network is a charitable organization under the Act, does it have to supply the Secretary of State with copies of its solicitation materials pursuant to W. Va. Code, § 29-19-8? . . .

II.

. . .

B. Is the Christian Action Network a "charitable organization"?

Our first issue is whether the Christian Action Network is a "charitable organization" which is subject to the mandates of the Solicitation of Charitable Funds Act. The Act defines "charitable organization" as ["]a person who is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious or eleemosynary organization, or any person who solicits or obtains contributions solicited from the public for charitable purposes, or any person who in any manner employs any appeal for contributions which may be reasonably interpreted to suggest that any part of such contributions will be used for charitable purposes. A chapter, branch, area, office or similar affiliate or any person soliciting contributions within the state for a charitable organization which has its principal place of business outside the state is a charitable organization for the purposes of this article.["] W. Va. Code, 29-19-2(1)[.]

. . . [W]e hold that an organization which "holds itself out to be an . . . educational . . . organization" is a "charitable organization" within the meaning of W. Va. Code, 29-19-2(1) [1992] of the Solicitation of Charitable Funds Act and, thus, is subject to the requirements of that Act. [W]e conclude that the Christian Action Network is a "charitable organization" as that term is defined in W. Va. Code, 29-19-2(1) [1992].

C. Is the mandated statement in W. Va. Code, 29-19-8 constitutional?

We now address whether the Christian Action Network is required to include in all of its printed solicitations the following statement mandated by W. Va. Code, 29-19-8 [1992]: "'West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305. Registration does not imply endorsement.'" The parties break this issue into two parts. First, the Christian Action Network asserts that the legislature has, by requiring charitable organizations to print the statement quoted above, mandated speech in violation of the First Amendment to the Constitution of the United States. Second, the Christian Action Network asserts that the W. Va. Code, 29-19-8 [1992] requirement that the printed statement be placed in a conspicuous place on the written solicitation materials is unconstitutionally vague.

i. Mandated Speech Issue

Our discussion of this issue must begin with the fundamental premise that charitable appeals for funds are speech protected under the First Amendment of the Constitution of the United States and

under article III, section 7 of the Constitution of West Virginia.[9] As the United States Supreme Court of Appeals has explained:

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).[10] Thus, although charitable appeals for funds are subject to reasonable regulation, "the state bears the burden of showing that its regulation is narrowly tailored to further a strong, subordinating interest that the state is entitled to protect." Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1230 (4th Cir. 1989) . . ..[11] See also Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 960-61 (1984).

There is no question that "the interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 792 (1988). See also Famine Relief Fund v. State of West Virginia, 905 F.2d 747, 751 (4th Cir. 1990) (The Supreme Court of Appeals has "acknowledged the legitimate state interest in regulating this type of speech to prevent fraud and misrepresentation. This regulation, however, must be narrowly tailored to further that interest without unnecessarily intruding upon the charities' right of free speech." . . . As we have already explained, one of the purposes of the Solicitation of Charitable Funds Act is "to prevent deceptive and dishonest statements and conduct in the solicitation and reporting of funds for or in the name of charity." W. Va. Code, 29-19-1a [1986]. This purpose reflects a substantial state interest which would justify a narrowly tailored regulation.

The Christian Action Network, however, asserts that requiring it to print on its written solicitation material the mandated statement in W. Va. Code, 29-19-8 [1992] is not a narrowly tailored statute which prevents fraud. In support of its position the Christian Action Network relies on Riley, supra.

One of the issues in Riley was whether "the requirement that professional fundraisers disclose to

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[9]. . . As we have explained on prior occasions, ["]this Court must at a minimum apply the standards the Supreme Court of the United States uses to analyze First Amendment issues pursuant to W. Va. Const. art. I, § 1 . . .. However, this Court has stated that pursuant to the right of the majority to 'reform, alter, or abolish' an inadequate government set forth in article III, § 3 of the Constitution of West Virginia, more stringent limitations on the government's ability to regulate free speech may be imposed under our constitutional free speech provision than is imposed on the states by the Fourteenth Amendment to the U.S. Constitution.["] Wheeling Park Commission v. Hotel and Restaurant Employees, International Union, AFL-CIO, 198 W. Va. 215, 221, n. 6, 479 S.E.2d 876, 882, n. 6 (1996) . . .. Thus, the United States Supreme Court's analysis of the various standards that are applied to First Amendment issues is a useful starting point because "it establishes the floor below which we may not venture." Id.

[10]The United States Supreme Court further explained that a charity's appeal for funds is not purely commercial speech, and thus, any government regulation of such speech warrants a more stringent review: "Because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech." [Schaumburg.]

[11]As noted in Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 795 (1988), "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." Thus, any statute mandating speech is a content-based regulation and as such warrants a strict scrutiny analysis. Id.

potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity[]" is constitutional. [Id.] After noting that the percentage requirement might have an unequal effect upon charity campaigns with high costs and expenses, the Supreme Court of the United States concluded that the requirement was unconstitutional because "more benign and narrowly tailored options are available." [Id.] The following are some of the options suggested by the court in Riley:

> [A]s a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. [Id.]

We find that W. Va. Code, 29-19-8 [1992] is a "more benign and narrowly tailored" option than the regulation at issue in Riley, supra. Clearly, the mandated statement in W. Va. Code, 29-19-8 [1992] is a neutral statement which simply directs a donor to a place where he or she may find more information about the organization if the donor so chooses. Indeed, a state may constitutionally require a charitable organization to provide information regarding its financial documents:

> A state's regulations can require a charity to disclose its financial statements. This disclosure fosters the substantial state interests in informing the public and preventing fraud without being unduly burdensome. Financial statements document an organization's activities and are necessary for regulators and interested donors to monitor any potential mismanagement or fraud. Furthermore, any responsible organization will maintain financial records for its own internal controls.

[Famine Relief Fund. See also Riley.] Thus, the mandated statement in [W. Va. Code 29-19-8] burdens no more speech than is necessary to further the substantial state interest of "preventing deceptive and dishonest statements and conduct in the solicitation and reporting of funds for or in the name of charity." [§ 29-19-1a].[12]

At least one other court has addressed the issue presently before us and has come to the same conclusion. In Telco Communications, Inc., supra, the United States Court of Appeals of the Fourth Circuit was confronted with whether the following language in a Virginia statute violated the First Amendment of the United States Constitution: "'Every professional solicitor who solicits contributions from a prospective contributor in this Commonwealth: . . . (iii) shall further disclose, in writing, the fact that a financial statement for the last fiscal year is available from the State Office of Consumer Affairs.'" [Id.] In concluding that the Virginia statute was constitutional, the court explained that

> [t]he information contained in the financial statements . . . is invaluable. A donor can use this information to determine if a particular solicitation is bona fide by ascertaining whether the solicitor is registered. A donor might also use this information to learn further about a solicitor's operations. Additionally, this section assists in preventing fraud. When comparative information is available, inaccuracies in inducements are less likely to occur. If they do occur, they are more likely to be discovered.

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[12]The Christian Action Network asserts that the mandated phrase "registration does not imply endorsement[,]" in W. Va. Code, 29-19-8 [1992] "suggests to the person solicited that this may be a bad charity, so avoid it." Thus, the organization concludes that the inclusion of this phrase violates its right to free speech.

We disagree. The phrase simply informs the donor that the Secretary of State is not expressing an opinion one way or the other about the charitable organization's reputation or importance.

> Section 57-55.2, moreover, is narrowly tailored. The statute requires that the disclosure be made in writing to prospective contributors. With respect to written solicitations, a brief notation of this nature is not a burdensome requirement. . . . Section 57-55.2 simply requires a similar, neutral disclosure about the availability of reports from the government. It affords 'more speech' to the public, but does not silence the solicitor.

[Id.] We find the above reasoning of Telco Communications, Inc. to be persuasive.

Accordingly, we hold that pursuant to W. Va. Code, 29-19-8 [1992] of the Solicitation of Charitable Funds Act all charitable organizations must include the following statement on every printed solicitation: "'West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305. Registration does not imply endorsement.'" The mandated statement does not violate the First Amendment to the Constitution of the United States or article III, section 7 of the Constitution of West Virginia because it burdens no more speech than is necessary to further the substantial state interest of "preventing deceptive and dishonest statements and conduct in the solicitation and reporting of funds for or in the name of charity." . . .

D. [The Secretary's Statuory Authority]

Finally, we address whether the Secretary of State is authorized under the Solicitation of Charitable Funds Act to require charitable organizations to file with his office copies of solicitation materials mailed to the public.

[The statute] does not authorize the Secretary of State to require charitable organizations to submit to his office copies of any solicitation materials mailed to the public.[21] Thus, in the present case we reverse the circuit court's holding on this issue and hold that . . . the Solicitation of Charitable Funds Act does not implicitly authorize the Secretary of State to require that the Christian Action Network submit to his office a copy of any solicitation materials the organization mails to the public. . . .

Affirmed, in part, and reversed, in part.

FISHER v. CITY OF CHARLESTON,
188 W.Va. 518, 425 S.E.2d 194 (1992).

BROTHERTON, Justice:

This petition for a writ of mandamus was filed by Sandy Fisher, a registered voter in Kanawha County, West Virginia. She is politically active in grass roots political, consumer, and citizens issues and lives in the newly-created Kanawha County minority-influence legislative district. In the May 12, 1992, primary election, she supported a minority candidate for the West Virginia Legislature. The petitioner attempted to promote her candidate by placing an 8 1/2 " x 11" black

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[21]If the legislature should choose to amend the Solicitation of Charitable Funds Act it should be mindful of the holding in Famine Relief Fund, supra, in which the United States Court of Appeals of the Fourth Circuit found that a portion of West Virginia's Solicitation of Charitable Funds Act was unconstitutional. More specifically, the Fourth Circuit concluded that the provisions of the Act then in place which prevented a charitable organization, waiting for a judicial determination of the correctness of the administrative denial of the registration, from soliciting in West Virginia was an unconstitutional prior restraint on speech. Id. See also Telco Communications, Inc., supra (Found that Virginia's charitable solicitation law which required the submission to the government of the script of an oral solicitation at least ten days prior to the solicitation to be an unconstitutional prior restraint on speech). The legislature has since amended our Act in an attempt to address the problems noted in Famine Relief Fund, supra. We decline to address whether the legislature was successful in rectifying the problems in Famine Relief Fund as that issue is not before us. However, we caution the legislature to be mindful of that decision when making any amendments to the Solicitation of Charitable Funds Act. [Relocated footnote.]

and white candidate support sign in the front window of her home and in her front yard.

On February 7, 1992, the Charleston City Manager Curt Voth sent a letter to candidates to "remind" them of the zoning ordinances "as they apply to placement of political signs in residential areas and public rights of way in our beautiful city.... These signs can sometimes be damaging to trees, and often create an unsightly appearance. Under the City of Charleston zoning law, political signs are considered to be 'off-premise' signs since they contain messages unrelated to services where the signs may be located. They are not permitted in residential areas or the downtown district."

In April, 1992, the appellant attempted to place candidate signs in the window of her home and in her yard. She was advised by Al Carey, the Zoning Inspector for the City of Charleston, that she could not put the signs in her home or yard. On April 7, 1992, the petitioner received material from the city manager advising her how to appeal for a variance so that she could put up her candidate support signs. Thus, on April 14, 1992, she filed an application to the Board of Zoning Appeals of the City of Charleston. In the application the petitioner stated that she "wished to put a sign in my window and in my yard that would state 'Vote for Norman Ferguson for House of Delegates.' "

The Board of Zoning Appeals scheduled a hearing on her application for May 28, 1992. Unfortunately, this was sixteen days after the primary election, and her candidate had lost the election. . . . [O]n May 29, 1992, the Board of Zoning Appeals denied her application based upon Zoning Ordinances §§ 18-1-1 and 21-10.[1] . . . It is from this denial that that the petitioner files this petition for a writ of mandamus. . . .

The intent behind the prohibition of signs within the City of Charleston is . . . to:

(a) Provide for the size, location, construction, and manner of display of signs; and

(b) Permit such signs that will not, by reason of their size, location, or manner of display, endanger life or limb, confuse traffic, obstruct vision, or otherwise endanger the public morals, safety or welfare; and

(c) Prevent signs from causing an annoyance or disturbance; and

(d) Protect or improve aesthetic quality by regulating the placement and size of signs.

An "off-premise" sign is defined as "[a] sign which contains a message unrelated to a business or profession conducted or to a commodity, service or entertainment sold or offered upon the premise where such sign is located." Zoning Ordinance § 2-2.[2] An "on-premise" sign contains a message

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[1]Section 18-1.1 of the Charleston Zoning Ordinance provides the general prohibition against signs, handbills, posters, and other advertisements and notices:

No person shall stick, print, stamp, attach, hang or suspend upon any public building, traffic sign, street marker or upon any pole or upon any telephone, telegraph or other poles belonging to the city or to electric, telephone, telegraph or other companies, or upon any street or sidewalk, pavement or any other public place any printed, written, painted or other advertisement, bill, notice, political poster or advertisement or any other sign or poster.

No papers, handbills, cards, circulars, political advertisements or advertising matter of any kind shall be thrown, pushed, cast, deposited, dropped, scattered, distributed or left in or upon any street, sidewalk, or other public place, or upon any vacant lot or premise within the city, if it is likely that the material might be scattered by the wind upon the streets or public places within the city; provided, that the provisions of this section shall not prevent the delivering of newspapers within the city.

No structure of any kind to be used as a sign or advertising of any sort shall be built, placed, erected, hung or left in or upon any street, sidewalk or other public place, except such as may lawfully be allowed under the laws of the city. . . . [relocated footnote]

[2]City of Charleston ordinance § 21-10 is entitled Off-Premise Sign Regulations, and § 18-1-1 is entitled Advertisements, Handbills, Signs, Etc. Section 21-10 provides:

(a) Off-premise signs shall be permitted in the following districts:

(1) C-6 Community Commercial District and C-10 General Commercial District.

(2) I-2 Light Industrial District.

(3) I-4 Heavy Industrial District.

which is related to a business or profession or to a commodity, service, or entertainment sold or offered upon the premise where the sign is located. On-premise signs are allowed in all districts subject to general limitations on size, set-off, placement, and type. Off-premise signs are permitted only in designated districts, which do not include residential districts.[3] Zoning Ordinance § 21-10(c). Consequently, under Charleston's zoning ordinances, Ms. Fisher would be permitted to advertise a home business, but not her political views, unless she was the candidate whose signs she wished to display.

The specific issue of restrictions on political speech has not been addressed by this Court prior to this case. However, we have ruled that political speech is "at the core of the interest protected by constitutional free speech guarantees." West Virginia Citizens Action Group v. Daley, 174 W.Va. 299, 324 S.E.2d 713 (1984). . . . Daley recognizes that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [In] Daley, the Court provides limitations on governmental regulation of the exercise of the free speech guarantee: "To minimize the potential 'chilling effect' of regulations governing the exercise of rights guaranteed under constitutional free speech provisions, those regulations must be both narrowly and clearly drawn."

The United States Supreme Court has discussed the issue of governmental entities controlling speech, although the precise issue present in this case has not been addressed. The facts before us today are similar, although not identical, to those found in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 503 (1981). Metromedia involved the City of San Diego's attempt to prohibit "outdoor advertising display signs[.]" ... Exempted from the prohibition was, among other types of signs, "temporary political campaign signs." ...

In ruling that off site commercial billboards could be prohibited while on-site commercial billboards were permitted, the Court stated that "[i]t does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. The fact that the City may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." . . .

In Metromedia, the United States Supreme Court indicated that "insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."

...Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial

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(b) Off-premise signs in a SPI-UR District shall be governed by the Council approved plans for such a district.
(c) If not expressly permitted in (a) or (b) above, off-premise signs shall be prohibited.

[3]Zoning Ordinance § 21-7(a) permits on-premise signs:

(1) One non-illuminated nameplate sign is permitted on either a wall or ground pole, identifying the owner or occupant of a residential building,provided the surface area does not exceed one square foot and the sign is set back at least three feet from the front property line. The maximum height of the sign shall be six feet.

(2) One sign, not to exceed 12 square feet in area, shall be permitted for the following uses where permitted: Church, school, museum, other community facility, other special permit use, planned unit development, group housing development, subdivision, or nonresidential principal use. Such sign shall be solely for the purpose of identifying the use and its services or activities and may be illuminated (no exposed neon). Such sign shall not be closer than ten feet to the curb nor more than ten feet in height.

(3) A home occupation may be identified by one wall sign not exceeding a total area of two square feet, affixed to the building, and not projecting more than one foot beyond the building. Illumination of such sign shall be either by means of white non-flashing enclosed light design or by indirect lighting from a shielded source.

speech to evaluate the strength of, or distinguish between, various communicative interests....With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." Consolidated Edison Co., [v. Public Service Commission], 447 U.S. [530], at 538. Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones. . . . Thus, the Court concluded that if a city permits commercial advertising, then it cannot preclude noncommercial speech.

In the case now before us, the City of Charleston shows a preference for commercial speech by generally allowing commercial signs, but prohibiting most noncommercial signs. Applying Metromedia's findings to these facts, it is clear that insofar as the City of Charleston allows commercial signs, such as on-site advertising, it cannot forbid noncommercial speech, such as political signs. As noted in Metromedia, the City "may not choose the appropriate subjects for public discourse." Id. Consequently, the City of Charleston cannot forbid political candidate signs while permitting commercial advertising.

We acknowledge that there is a distinction between the San Diego billboard regulation and the Charleston ordinances. The Charleston zoning ordinances limit the commercial signs to on-site commercial advertising signs and does permit candidate signs at the home of the candidate whose sign is displayed. The San Diego ordinance addressed billboards located in areas quite different from the largely residential area at issue in this case. Nonetheless, we believe the general premise of Metromedia is applicable to our case. It is improper for a city to allow on-site commercial signs while forbidding what amounts to on-site noncommercial signs: the political thoughts of the owner of that property.

We conclude that the City unconstitutionally limited a citizen's right to express noncommercial political speech by forbidding all political or candidate signs. This does not mean, however, that the City cannot provide some regulation of the political or candidate signs. Thus, we next discuss what limits the City can place on the right of a citizen to display noncommercial political or candidate signs in her yard or home.

In Schneider v. New Jersey, 308 U.S. 147 (1939), the United States Supreme Court first discussed the issue of a governmental prohibition on expression. In Schneider, the Supreme Court invalidated a restriction on door-to-door and street distribution of circulars, where valid governmental purposes could be achieved through less restrictive alternatives. The Court concluded that the purpose of keeping the streets clear was insufficient to justify an ordinance which would prohibit all public distribution of circulars. As a method of determining what speech could be abridged in this manner, the Court adopted a balancing approach and found that the state's purpose in maintaining reasonably clean streets at low cost could be achieved by measures less drastic than a total ban on all handbills. . . .

More recently, in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the United States Supreme Court stated that the primary consideration in determining whether a governmental regulation on speech is proper depends upon several factors: "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." . . . A government's restrictions on the exercise of First Amendment free speech rights will be sustained if the regulations " 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)." Id.

In the case now before us, we agree with the respondents' assertions that the ordinance is generally content neutral. This is illustrated by the numerous other types of signs the ordinance forbids in addition to political or candidate signs, although there are unsubstantiated allegations of unequal

application. A narrower issue exists, however, of whether the ordinance is "narrowly tailored" to serve the governmental interest in preserving the appearance and safety of the neighborhoods. "[T]he requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " . . . The regulation "need not be the least restrictive or least intrusive means of doing so." . . .

We believe that the rule found in Schneider, discussed supra, is implicit in the requirement of Ward v. Rock Against Racism. Thus, in order to control the use of noncommercial political or candidate signs on private property, the government must (1) have a legitimate, significant interest in the regulation; (2) the restrictions which regulate the time, place, and manner of the speech must be narrowly tailored to achieve those goals and go no further than necessary to achieve the government's goal; (3) the regulation may not burden a substantial portion of speech in a manner that does not advance its goals; and (4) the regulation must leave open ample alternative channels for communication.

While we agree that there is a legitimate and significant governmental interest in aesthetics and preserving the quality of life, the current City ordinance is much too broad and places a substantial burden on the regulation of speech in a manner that does not serve to promote its goals. While Rock Against Racism does not require that the ordinance be the least restrictive alternative, the Charleston ordinance is overbroad. As it is now written, the ordinance leaves open few alternative channels for communication of the political information. With few resources, the petitioner's opportunity to express her views is very limited. In this era of multimillion dollar campaigns for political office, the right of an individual to express herself at a reasonable cost seems even more vital. That right takes on a more critical element when the individual attempts to do so from her own property.

Nor do we believe Metromedia grants the homeowner a year-round right to place political signs in her yard or home, as the respondents contend. As we noted above, Metromedia dealt specifically with billboards, which were available year round for commercial use for those who wished to pay for the right to advertise. Nothing in Metromedia supports the right to the unlimited use of political signs. In fact, the Court mentions, albeit briefly, that temporary candidate and political signs were permitted without finding that the City of San Diego erred in allowing the signs only temporarily. . . . Although the Court in Metromedia rejected the appellee's suggestion that the San Diego ordinance was appropriately characterized as a "reasonable time, place and manner" restriction, it explained that such restrictions are permissible under certain circumstances[.] Unlike Metromedia, the facts in the present case involve largely residential areas which are not traditionally blanketed with signs and advertising, and thus, are inherently different from the locales in which billboards are generally found.

There is no question that the City is entitled to adopt a zoning ordinance which promotes their interest in land use planning. See W.Va.Code § 8-24-1 et seq. (1990). Further, we agree that the respondent has a substantial interest in protecting and preserving the residential quality within the City by reducing the clutter created by signs and promoting safety on residential streets by limiting these signs. However, the zoning ordinance in question is overbroad: A city cannot forbid noncommercial advertising while allowing commercial advertising, although some regulation is permitted.

We believe that permitting the political signs on a temporary basis, as well as regulating size, set back, type, and number, would be considered a reasonable time, place, and manner restriction. The temporary nature of the signs is justified without reference to the content of the sign and serves a significant and legitimate governmental interest in maintaining order and safety in residential and downtown areas. Although the signs are temporary, they are permitted at the time they are most necessary for the expression of political views. Once the elections are over, there are other avenues which leave open ample alternative channels for communication of the information in question.

Given the time, place, and manner restrictions discussed in Ward and Schneider, we believe the zoning ordinance would be both reasonable and narrowly tailored if it permitted the placement of

temporary political or candidate signs for a specified period of time before primary and general elections, with the requirement that all signs must be removed within a specified period after the polls close. Further, the number of signs permitted could be limited, within reason, as well as the size, type, placement, and set back, for reasons of safety, public morals, and aesthetics. We suggest that the specifics regarding the sign type, size, and set back coordinate with Zoning Ordinance 21-7(a), which sets out the requirements for on-premise candidate signs. . .

Accordingly, we grant the petition for a writ of mandamus and rule that the City of Charleston Zoning Ordinances §§ 18-1-1 and 21-10 are unconstitutionally overbroad in forbidding temporary candidate or political signs, and that the Zoning Board of Appeals erred in denying the petitioner's application. It is up to the Charleston City Council to rewrite a narrowly tailored zoning ordinance dealing with temporary political or candidate signs, in accordance with the provisions set forth in this opinion. . . .

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4. Public Institutions and Speech Rights

IN THE MATTER OF HONORABLE JOHN HEY,
192 W. Va. 221, 452 S.E.2d 24 (1994).

Cleckley, Justice:

This judicial disciplinary proceeding arises from a determination of the Judicial Investigation Commission (Commission) that probable cause existed to file a complaint against the Honorable John Hey, Judge of the Circuit County of Kanawha County, based upon purported violations of Canon 1, Canon 2A, and Canon 3A(6) of the West Virginia Judicial Code of Ethics. After hearing all the evidence presented, a Special Judicial Hearing Board (Special Board) convened for Judge Hey's case determined that the evidence was insufficient to support the Commission's complaint. The Special Board recommended the dismissal of the Commission's complaint against Judge Hey.

Before this Court, Judge Hey argues that the evidence against him was insufficient as a matter of law and that under the circumstances of this case any decision adverse to him would violate his rights under the First Amendment to the United States Constitution. After an independent evaluation of the record, we find that the evidence does not provide clear and convincing proof of violations of any of the designated Canons in the Code of Judicial Conduct or the Judicial Code of Ethics. Additionally, we find that a contrary result would constitute an infringement of Judge Hey's rights that are protected by the First Amendment to the United States Constitution and by Section 7 of Article III of the West Virginia Constitution. Therefore, we adopt the recommendation of the Special Board and order the complaint dismissed.

I.

On December 17, 1992, this Court adopted the recommendation of the Judicial Hearing Board (Hearing Board) in the case of *Matter of Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992). As a result, Judge Hey was publicly censured for discussing on a national television program, "Crossfire," the details of a case pending before a West Virginia Court. On the day following his censure, Judge Hey appeared on a talk show on a local radio station and discussed various issues, including his censure and the behavior of some members of the Hearing Board.

During the radio broadcast, Judge Hey mentioned that one of the members of the Hearing Board that recommended his censure was the wife of the president of the University of Charleston and that this particular Hearing Board member walked out while the Hearing Board reviewed the videotape of "Crossfire". Judge Hey remarked that she "didn't even view 15 minutes of it so I'm not done with her yet. I want her to understand that. I hope she or one of her friends are listening."

Judge Hey was referring to Hearing Board member, Dr. Janet Welch. Although Dr. Welch did not

actually hear the radio interview, friends and various other individuals fearing for Dr. Welch's welfare informed her of Judge Hey's statements and warned her to be careful. Because of the warnings, Dr. Welch filed a complaint against Judge Hey with the Commission on December 30, 1992.

In response to the complaint, Judge Hey asserted that his radio comments were not meant as a threat to Dr. Welch. Furthermore, Judge Hey argued that because the comments were not made in the course of his official duties, they gained First Amendment protection.

After investigating Dr. Welch's complaint, the Commission determined that there was probable cause to file a complaint with the Hearing Board. The Commission filed the complaint on April 13, 1993. In order to avoid a potential conflict of interest, the Special Board was convened to hear the complaint against Judge Hey. The Special Board held a full hearing on the case on March 29, 1994.

At the hearing, Judge Hey testified that his radio comments were intended to indicate that he would subpoena and depose Dr. Welch in a related civil proceeding pending against him. Judge Hey did not provide this explanation during the radio broadcast. Dr. Welch testified that she did not actually hear the radio program when Judge Hey made his comments, but instead became aware of the radio broadcast after a number of individuals questioned her about Judge Hey's comments at a Christmas party.

After hearing from Judge Hey, Dr. Welch, and various other witnesses, the Special Board concluded: "Although a circuit judge's conduct and speech is limited in many ways by the Code of Judicial Conduct, a circuit judge does not lose the full protection of the First Amendment Rights of the United States Constitution, especially when he is a party litigant." The Special Board voted 5-2 to dismiss the Canon 2 charges and voted 7-0 to dismiss the charges based on Canons 1 and 3. The Special Board recommended to this Court that the complaint against Judge Hey be dismissed.

II.

Allegations in judicial disciplinary proceedings must be proved by clear and convincing evidence. In Syllabus Point 4 of *In Re Pauley*, 173 W. Va. 228, 314 S.E.2d 391 (1983)[.] . . .

The evidentiary support for the charges in this case stems from the stray ramblings of Judge Hey during a radio program interview. The evidence, although conflicting in part, can be summed up by the statement that no one offered any substantial or persuasive information from which it can be shown that Judge Hey's comments conveyed a physical or otherwise improper threat. As stated above, Dr. Welch testified that she did not hear the actual airing of the comments of Judge Hey. The only witness with firsthand knowledge who testified in support of the complaint was Karen Glazier. Essentially, Ms. Glazier felt that Judge Hey's comments were unprofessional, but she did not remember Judge Hey's comments as being of a threatening nature. . . .

III.

Although we believe the evidence is insufficient to support the charges of ethical violations,[4] we

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[4]The facts here are substantially distinguishable from those cases in which this Court has found a violation of Canon 1. Canon 1 reads as follows:

> "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

See Matter of Eplin, 187 W. Va. 131, 416 S.E.2d 248 (1992) (magistrate accorded special treatment to a criminal defendant in order to curry favor with a state senator); *Matter of Boese*, 186 W. Va. 46, 410 S.E.2d 282 (1991) (in a series of harassing telephone calls between magistrate and ex-husband, magistrate used "obscene and abusive language"; some of these conversations occurred while the magistrate was on duty and in her office); *Matter of Gainer*, 185 W. Va. 8, 404 S.E.2d 251 (1991) (magistrate found to have squeezed breasts of a fifteen-year-old student employee). To the contrary, where the evidence has been questionable and conflicting, this Court has not hesitated to find a failure of proof. *See Matter of Atkinson*, 188 W. Va. 293, 423 S.E.2d 902 (1992) (evidence insufficient to establish knowledge of wrongdoing by magistrate).

directly address whether the First Amendment rights of Judge Hey are implicated in these proceedings. . . .

Unquestionably, it is within this Court's power to discipline judges. W. Va. Const. art. VIII, § 8. . . . But in doing so, we have a corresponding duty not to ignore judges' constitutionally protected rights. The competition between the demands of government and the free speech interests of its servants has been before us in other contexts. In our cases on public employees' speech, we have recognized that the government as an employer has special interests that can support narrowly tailored limitations on employees' expressive and political activities. *E.g.*, *Weaver v. Shaffer*, 170 W. Va. 107, 290 S.E.2d 244 (1980). At the same time, our cases confirm that public employees retain a considerable measure of First Amendment protection against unnecessary restraints of their speech and association by their employer. *E.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968);[6] *Orr v. Crowder*, 173 W. Va. 335, 343, 315 S.E.2d 593, 601 (1983)[.] "Any regulations pertaining to such employees must recognize such rights and strike a balance between the interests of such employee, as a citizen commenting on matters of public concern, and the interests of the state in promoting efficiency in its affairs." *Gooden v. Board of Appeals of W. Va.*, 160 W. Va. 318, 324,

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The case against Judge Hey under Canon 2A is equally deficient. Canon 2A provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In reference to Canon 2A, we have noted in *Matter of Gorby*, 176 W. Va. 11, 14, 339 S.E.2d 697, 700 (1985), *quoting* Syllabus Point 7, *Matter of Bennett*, 403 Mich. 178, 267 N.W.2d 914 (1978):

> "'[A] judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions. Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench.'"

Our prior cases have found violations of Canon 2A where the evidence was clear and convincing and the conduct complained of was egregious. *See Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993) (magistrate helped to create misleading campaign advertisements for his wife's circuit judge campaign); *Matter of Boese*, *supra* (magistrate violated Canons 1, 2A, and 2B as a result of a series of harassing telephone calls between magistrate and her ex-husband); *Matter of King*, 184 W. Va. 177, 399 S.E.2d 888 (1990) (family law master violated Canon 2A by making misrepresentations regarding status of decision); *Matter of Gorby*, *supra* (magistrate shouted, used foul and abusive language, and may have used even physical force against other people at a football game).

Unlike the words of Judge Hey, the above conduct was either deceptive, illegal, or a flagrant abuse of power. More significantly, the evidence against the judicial officer was substantial.

Canon 3A(6) of the Judicial Code of Ethics states:

> "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

In *Matter of Hey*, 188 W. Va. at 547-48, 425 S.E.2d at 223-24, we stated "that the test for judicial impropriety under Canon 3A(6) is whether the judge's public comments on a specific case raise a reasonable question as to impartiality." *See also Matter of Codispoti*, 190 W. Va. at 373, 438 S.E.2d at 553. We also stated in *Matter of Hey* that Canon 3A(6) would be violated if a judge's public comments involved a case pending or impending in any court in West Virginia. 188 W. Va. at 548, 425 S.E.2d at 224.

The Commission based [its] complaint against Judge Hey on the fact that he made comments about this Court's decision in the previous *Hey* case and the comments about Dr. Welch. None of the comments made by Judge Hey during the radio broadcast could possibly constitute a violation of Canon 3A(6) because the comments were not directed to a case that was pending or impending before any court. In fact, not only was Judge Hey a party to the case that he mentioned, but the case had been fully resolved by this Court.

[6]We have described *Pickering* as holding that "public employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights." *Orr v. Crowder*, 173 W. Va. 335, 343, 315 S.E.2d 593, 601 (1983) (describing part of the *Pickering* holding).

234 S.E.2d 893, 897 (1977).[7]

Judges are not typical, run-of-the-bureaucracy employees, nor does our oversight of judicial disciplinary proceedings present us with an employment context. Moreover, the State's interests in regulating judicial conduct are both of a different nature and of a greater weight than those implicated in the usual government employment case. The State has compelling interests in maintaining the integrity, independence, and impartiality of the judicial system--and in maintaining the appearance of the same--that justify unusually stringent restrictions on judicial expression, both on and off the bench. As the Fifth Circuit Court of Appeals has noted, a "state may restrict the speech of elected *judges* in ways that it may not restrict the speech of other elected officials." *Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990), *citing Morial v. Judiciary Comm'n*, 565 F.2d 295 (5th Cir. 1977) (en banc) . . . (Emphasis in original).

Despite these differences, the public employee-free speech cases provide an appropriate analogy in this case because the clash of interests requires us to engage in a similar balancing process.[8] It is the same approach we have taken in considering the impact of disciplinary rules on lawyers' speech. *See Committee on Legal Ethics v. Douglas*, 179 W. Va. 490, 497, 370 S.E.2d 325, 332 (1988) ("the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute"); *Pushinsky v. Board of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980) (Bar admission process may not inquire into an applicant's beliefs, advocacy, or associational activities). That is: the State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests. The principles to be applied in these various contexts (concerning public employees, judges, and lawyers) are the same, although the interests to be weighed are different and, thus, the outcomes in particular cases may therefore vary. As in any other free speech context, the regulation of speech cannot exceed that which is necessary

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[7]The United States Supreme Court has also addressed the issue of balancing the interests of the public employer and its employees. In the Supreme Court's most recent decision in this area, *Waters v. Churchill*, [511 U.S. 661] (1994), it recognized that the government as an employer has efficiency interests that "should . . . be assigned a greater value" than when the government acts as a sovereign regulating the public generally. Thus, the government-as-employer may rely on procedures that would be constitutionally inadequate if used by the government-as-sovereign. The case left thoroughly intact, however, the principle established by such decisions as *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); and *Pickering*: The State may not punish an employee for her speech about a matter of public concern unless """the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees""" outweighs """the employee's interest in expressing herself on this matter[.]""" *Waters v. Churchill*, . . . *quoting Connick* and *Pickering*.

[8]Balancing is the appropriate analysis here because its setting (the judicial system) places this case in the line of diverse decisions addressing the State's ability to restrict speech in order to operate effectively its own institutions. In each of these contexts, the institutional interests of the State, which are typically unrelated to the suppression of expression, are balanced against the individual's free speech interests. Such contexts include, among many others, the operation of public schools, *e.g.*, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260(1988); state colleges and universities, *e.g.*, *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972); prisons, *e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Adderley v. Florida*, 385 U.S. 39 (1966); public employment, *e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983); *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983)[;] (1984); park systems, *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); and government grants, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). From even this abbreviated sampling, it can be seen that an individual's free speech expectations and the government's legitimate interests in restraining speech can vary dramatically depending upon the context. Consequently, each of these contexts has developed its own doctrine to a certain extent. *See* note 7, *supra*. Of course, when the State discriminates against a class of protected speech using its regulatory or police powers--as opposed to its proprietary or spending powers in the above examples--the analysis must be considerably more exacting. *E.g.*, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (speech classification must be necessary to advance a compelling governmental interest); *Boos v. Barry*, 485 U.S. 312 (1988) (Accord).

to achieve the State's legitimate interests. *E.g.*, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Pushinsky v. Board of Law Examiners*, 164 W. Va. at 741-44, 266 S.E.2d at 447-49.

Engaging the above analysis, we conclude that the State's interests in maintaining and enforcing the judicial canons against judges' speech are sufficiently served by their specific prohibitions so that the general prohibitions in Canons 1, 2, and 3 of the Judicial Code of Ethics (and now the Code of Judicial Conduct) may not be used to punish judges for their public remarks that do not concern a pending or impending matter and that do not violate either a specific prohibition or some other law.[9]

Turning to the specifics in this case, Judge Hey has been charged with violating Canons 1, 2, and 3 of the Judicial Code of Ethics for a statement he made regarding (as interpreted in the Special Board's findings of fact) the fairness of a prior disciplinary proceeding against him and intimating that he planned to take some reactive measure. So interpreted, the statement related to Judge Hey's status as an "accused" and not directly to his status as a judge in a pending or impending case.

Judicial disciplinary proceedings are subjects of the highest public concern. The media, and the public generally, are free to comment on and discuss such matters at length. *See, e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978); *see also Daily Gazette Co. v. Committee on Legal Ethics*, 174 W. Va. 359, 326 S.E.2d 705 (1984) (public has right of access to disciplinary proceedings against lawyers because of the public significance involved). In such cases, where the judge himself (or herself) is the target and his professional reputation and possibly his career are at stake, fairness to him and promotion of the search for truth in the public marketplace require that he have the right to respond and defend himself in the public debate as well as in formal proceedings. That is especially so in West Virginia, where judges are elected officials. A judge depends on public opinion to remain in his job, and the public needs balanced information about its judges to make informed decisions at the polls. The formal proceedings of the Judicial Hearing Board do not, by themselves, provide an accused judge with a sufficient forum to influence public perceptions, nor do they provide the end-all for the public's need to know about a judge's conduct.[10]

The Canons are not insensitive to the free expression rights of judges. Canon 4(B) of the current Code of Judicial Conduct provides that "[a] judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code." The commentary to Canon 3(B)(9)

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[9]Specific prohibitions in the current Code include Canon 4(C)(3)(b), which forbids judges from soliciting funds for educational, religious, charitable, fraternal, or civic organizations--an expressive activity clearly protected when engaged in by private citizens. *E.g.*, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *West Virginia Citizens Action Group, Inc. v. Daley*, 174 W. Va. 299, 324 S.E.2d 713 (1984). Similarly, Canon 5 strictly limits judges' participation in partisan political matters, another subject that clearly embraces constitutionally protected rights. *E.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976); *Buckley v. Valeo*, 424 U.S. 1 (1976). Such participation can be placed off-limits to judges because of compelling and countervailing governmental interests. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957 (1982) (sustaining resign-to-run law).

In addition, the requirements of Canon 2 that judges "shall respect and comply with the law" and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" could be legitimately applied to a judge's speech that is the subject of valid criminal laws, such as bans on obscenity, fighting words, unlawful incitement, and criminal solicitation. Some civil restraints on speech might also possibly form the basis for an appropriate disciplinary action. For example, it is not untenable that a judge's public, intentionally false, and viciously defamatory attack on an individual could be such a case. *See Committee on Legal Ethics v. Farber*, 185 W. Va. 522, 408 S.E.2d 274 (1991), *cert. denied*, ___ U.S.___, 112 S. Ct. 970, 117 L. Ed. 2d 135 (1992).

[10]This case must be distinguished from those in which a judge responds to attacks on his ruling(s) in a pending case. In that circumstance, the State's interests in maintaining the appearance of impartiality and independence of the judiciary trumps an individual judge's right to defend himself. But those interests of the State are not implicated to the same extent or in the same way when a judge publicly comments on charges of misconduct made against him in a formal disciplinary proceeding. As noted below, Canon 3 explicitly adopts this distinction and is, therefore, narrowly tailored to accomplish the State's interests.

of the Code of Judicial Conduct, which restricts a judge's ability to comment publicly, states that the restriction "does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity[.]"[11] These provisions certainly indicate that Judge Hey's remarks, which alluded only to a proceeding in which he was a party and were not otherwise specifically prohibited by the Code, are not within Canon 3's proscriptions. To now apply that Canon to his speech would create the same constitutional deficiency as that recently struck down by the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991). That case overturned a disciplinary action against a criminal defense attorney who had publicly but carefully responded to the case against his just-indicted client. The relevant disciplinary rule, the Court held, misled the attorney into thinking that he could engage in such expression and failed "to provide fair notice to those to whom [it] is directed." 501 U.S. at 1048 (Internal quotation marks omitted). The rule was therefore unconstitutionally vague.

Canons 1 and 2 also fail to provide an adequate or appropriate basis for limiting or disciplining judges' speech about their own disciplinary proceedings. Indeed, Canon 1's principle that judges shall uphold the integrity and independence of the judiciary could be disserved by punishing judges for discussing with the public the fairness and validity of their hearings. Clearly, the public has a need to know about any deficiencies in those proceedings, and the integrity of the judiciary cannot be advanced by a rule that chills critical discussion by those most knowledgeable of the very process created to enforce and protect judicial integrity.

Canon 2 directs that judges must avoid impropriety, and the appearance of impropriety, in their personal and professional conduct. (*See* Commentary to the current Canon 1(A)) This section cannot be stretched to restrict pure speech on a matter of public interest when the speech does not pertain to pending or impending cases and is not within a specific prohibition of the Code or some other law. It is difficult to comprehend how truthful remarks or statements of opinion by a judge about a matter of public significance unrelated to a matter before him, or likely to come before him, and which is not otherwise specifically prohibited can ever create the appearance of impropriety. In this case, Judge Hey accurately stated that a member of his hearing panel left the hearing for a period of time while it was in progress. He also claimed that he intended to do something about it. Although the statement could, somewhat implausibly, be taken as a physical threat, the hearing panel and this Court have found that a threat was neither intended nor reasonably inferable. Thus, there is nothing left in the remark that appears improper.

Finally, Canons 1 and 2 are fraught with subjectivity and elasticity. As stated in the Commentary to the current Canon 2(A), "it is not practicable to list all prohibited acts," and the canon is therefore "necessarily cast in general terms." The same could describe Canon 3. Such subjectivity and elasticity, or vagueness, create problems when applied to expression. That is, vague regulations fail to adequately direct regulatees and cause them to play it safe by foregoing participation in public discussion, thus discouraging them from engaging in what would be protected expression and also depriving the public of their contributions. *West Virginia Citizens Action Group v. Daley*, 174 W. Va. 299, 305-06, 324 S.E.2d 713, 719-20 (1984); *accord, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 598-600 (1967). More recently, the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. at 1051, emphasized that

> "the prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The

[11]See also Canon 2C, which, to avoid infringing upon a judge's associational rights, makes certain exceptions to a general ban on a judge's membership in organizations that discriminate on the basis of race, sex, religion, or national origin.

question is not whether discriminatory enforcement occurred here . . ., but whether the Rule is so imprecise that discriminatory enforcement is a real possibility."

This is not to say that Canons 1 and 2 are facially unconstitutional; rather, it means that those canons cannot constitutionally be manipulated to apply to a judge's off-the-bench remarks about a subject of public concern that is neither presently pending before him nor likely to come before him and that does not violate some other more specific provision of the Code or the law. A judge may not be disciplined consistent with the First Amendment to the United States Constitution or with Section 7 of Article III of the West Virginia Constitution for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member.

Admittedly, Judge Hey's comments created a storm of controversy and were not appreciated by many of the listeners, but it is in this context that the First Amendment plays its most important function. *See Waters v. Churchill*, [511 U.S. 661] (1994), *quoting Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate'"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging"). The comments of Judge Hey cannot be construed as a physical or otherwise improper threat against Dr. Welch. Judge Hey's commentary thus clearly falls within protected speech and need not be punished in order to maintain the purposes of the judicial canons. As often proved in this State, judges (like anyone else) have a right to be obnoxious in their public expression. They may continue to offend, so long as they refrain from violating specific provisions of the Code or some other law. While offensive expression may raise questions about the speaker's temperament and discretion, the Constitution requires that those questions must be answered by the public through the ballot box and not by this Court through disciplinary proceedings. The Special Judicial Hearing Board correctly recommended the dismissal of this complaint.

Complaint Dismissed.

NOTE: *Alderman v. Pocahontas County Board of Education*,
223 W.Va. 431, 675 S.E.2d 907 (2009).

Alderman had worked for the Pocahontas Board of Education for twenty-six years with positive evaluations and without any disciplinary actions and had worked his way into a position in the central office. Because of budget shortfalls, the Superintendent recommended that Alderman be transferred to a classroom teaching position. Alderman then invoked his statutory right to a hearing on the transfer.

Prior to the hearing, Alderman posted on his personal website that he would expose the "cockroaches" at his hearing, referring to the Superintendent, the district's Treasurer, and a couple of the Board members. He accused the first two of misappropriating funds and the board members of unlawfully serving on the Board. One of them, Alderman said, did not satisfy the district residency requirement because he was living with his mistress, and she lived in a different district from which he was elected and in which his wife lived.

At the hearing, Alderman never reached the substance of his transfer. Instead, and despite repeated pleas for him to get to issues at hand, he rather obnoxiously repeated his charges against the Superintendent, Treasurer, and Board members. After the hearing, Alderman boasted on his website that had exposed the Treasurer "for what she really is" and referred to the Superintendent as the Treasurer's "lapdog." Later, in a meeting in which the Superintendent disclosed that he planned to recommend Alderman's termination, Alderman again accused the Superintendent of being a "cockroach" and a "thief" and described him as "the dumbest man I have ever seen." [Note:

these were not good career moves.]

Alderman was fired and then pursued a grievance, which he lost. He then sued in the Kanawha Circuit Court claiming his discharge was based upon his exercise of his rights of free speech. The circuit court agreed, but the Supreme Court reversed. The Court held that Alderman had failed to meet his burden of showing that his conduct was constitutionally protected. The opinion by Justice Davis listed the following reasons for that conclusion:

> First, to be protected speech, it must be made with regard to matters of public concern. Mr. Alderman's comments about the Superintendent and Treasurer being cockroaches and thieves, his personal statements against the intelligence of the Superintendent, as well as his accusations of a Board member being an adulterer were not matters of public concern. Admittedly, thievery and misappropriation of money may be a matter of public concern. . . . [T]he issue of thievery and misappropriation arose from an allegation of the use of money for the golf team. The issue had been properly raised at a previous Board meeting and had already been through a full investigation with a finding of no impropriety. . . .
>
> Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *See Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Significantly, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." [*Id*.] Thus, taking the record as a whole, Mr. Alderman's speech was not addressing any matters of public concern. Because the issues were resolved and unsubstantiated, they were no longer being asserted by Mr. Alderman as a matter of public concern. Rather, they were being asserted to embarrass and interrupt the business of the Board and its members. This intent by Mr. Alderman is further illustrated by his internet posting before the hearing stating his intent to expose the members for the thieves and cockroaches that they are, as well as his website posting following the event, wherein he gloated that he had succeeded in his mission. . . .
>
> Second, statements that are made with the knowledge that they were false or with reckless disregard of whether they were false, are not protected. As found by the ALJ, Mr. Alderman's comments were made without consideration of the fact that they may or may not be false. The issue of the golf money had been resolutely decided by an investigation. However, Mr. Alderman continued to shake his finger at the Treasurer and call her a thief and a liar. Such comments were made without consideration of the fact that they may or may not be false. Moreover, his failure to provide any support for his assertion regarding the lack of proper residency by a Board member also shows his disregard for its truthfulness.
>
> Third, statements made about persons with whom there are close personal contacts that would disrupt discipline or harmony among coworkers or destroy personal loyalty and confidence may not be protected. . . . [Alderman's] comments were made about persons with whom there are close personal contacts that disrupt discipline among coworkers and destroy feelings of loyalty and confidence. . . .
>
> [The] employer has an interest in the efficient and orderly operation of its affairs that must be balanced with the public employee's right to free speech. We are further guided by the principle that, "'while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."' *Connick*, 461 U.S., at 154." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006). If the speech meets the test to be considered protected speech, then a balancing test is used to determine whether the speech must be tolerated even if it would undermine the Board's authority. Thus, even assuming, *arguendo*, that any of Mr. Alderman's speech met the test to be considered protected free speech, once that protection is balanced with the Board's interest in the efficient and orderly operation of its affairs, it is clear that Mr. Alderman's conduct interfered with the employer's interest.

> In this case, Mr. Alderman requested a hearing on his proposed transfer. The singular purpose of that hearing was to determine whether the recommendation had a sufficient basis to be approved. Instead, Mr. Alderman turned it into a malicious bashing session over matters that are unrelated to his transfer. This is a case of planned, insubordinate behavior that undermined the Board's authority to provide effective and efficient services to its students. Mr. Alderman's speech is not entitled to [constitutional] protection.

5. Section 16 Rights

[The commentary on the § 16 rights is excerpted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 129-30 (2nd ed., Oxford University Press, 2016).]

The Right to Peaceably Assemble

The freedom of assembly secures the right of persons to gather in public both to communicate with others and to persuade through group demonstration. The use of the public forum for peaceable assemblies and demonstrations has a time-honored place in the process of public debate and influencing policy. The West Virginia Court has recognized the right as "fundamental" and deserving of staunch judicial protection. *Woodruff v. Board of Trustees* (1984).

The Right to Consult for the Common Good

This provision makes explicit what is only implicit in the First Amendment: the freedom to associate with others to advance one's agenda. In this age of media conglomerates and mass population, the right is indispensable to the individual, for it is often only through participation in associational activity that individuals can effectively communicate their views. Accordingly, this right cannot be restrained by the State without a showing of compelling necessity. The West Virginia Supreme Court demonstrated its commitment to protecting the right in *Pushinsky v. Board of Law Examiners* (1980), which held that the State Bar could not inquire into an applicant's associational memberships beyond those held in organizations with unlawful aims that the applicant knew about and specifically intended to further.

The Right to Instruct Representatives

In light of § 16's inclusion of the right to petition, as well as § 7's general right of free speech, this provision is essentially redundant. It does make explicit an individual's right to communicate with government officials. The crucial value of such a right in a democracy, and a citizen's natural entitlement to it, are patent.

The Right To Petition

Section 16's guarantee of the right "to apply for redress of grievances" is commonly called the right to petition. It ensures that each person may appeal to the government, in any of its branches, to gain relief for specific injuries or to influence decision-making.

The West Virginia Supreme Court gave this right an expansive interpretation in *Webb v. Fury* (1981). That case granted a writ of prohibition against the prosecution of a libel suit that had claimed the defendant, an environmental gadfly, had defamed the plaintiff, a coal company, in a series of communications he had with federal regulatory agencies and in a newsletter. The agency communications included citizen complaints, a request for an inspection, and correspondence. The

Court held these were classic examples of a citizen exercising the right of petition, and as such, they were absolutely protected unless they were shown to be a sham designed to prevent the coal company from participating in governmental policy-making functions. In addition, because the newsletter was an appeal to its readers to influence legislators and enforcement agencies regarding the passage or enforcement of laws, it, too, was entitled to the same degree of protection under § 16 as the direct communications with the governmental agencies. More recently, the Court qualified the *Webb* decision in *Harris v. Adkins* (1993), which concerned a defamation action against an individual based on a speech he had made at a city council meeting. After acknowledging that an intervening decision of the United States Supreme Court, *McDonald v. Smith* (U.S. 1985), had ruled that a defamation defendant invoking the First Amendment's Right to Petition Clause was entitled only to the qualified "actual malice" immunity, and not to an absolute defense, the West Virginia Court said it could find no persuasive reason for giving a greater degree of protection to the State's right to petition than that accorded the federal right. Accordingly, the *Harris* defendant could be held liable for defamatory statements he made while exercising his right to petition if the plaintiff proved they were made with actual malice, i.e., with knowledge that they were false or in reckless disregard of the truth. To the extent that *Webb* was inconsistent with that holding, it was overruled.

The Court also entertained a right to petition argument in the "Red Devil Case," *State v. Berrill*. (See Section A-2, supra, for the facts.) The defendant argued "that his activity was peaceful conduct directed at communicating a grievance to government [and] that petitions to government, particularly in the case of perceived grievances, will involve controversy and passion, and thus his disruption of the meeting was part of the process of government." The Court rejected the argument, concluding "that the government can enforce content neutral restrictions on protected freedoms for the purpose of maintaining the orderly and peaceful process of political subdivisions. . . . [T]he anti-disruption statute proscribes breaches of the peace. '"The term '"breach of the peace"' is generic, and includes all violations of the public peace or order or decorum; in other words, it signifies the offense of disturbing the public peace or tranquillity enjoyed by the citizens of a community . . . By peace, as used in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns.' . . .."' There is a sound constitutional basis for action by the legislature to prohibit breaches of the peace."

Berrill also contended that *Webb* and the *Noerr-Pennington* Doctrine upon which it relied [see *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965)] insulated his antics at the school board meeting. The Court was unpersuaded:

> "*Webb* and the cases discussed in it relating to the *Noerr-Pennington* doctrine involved claims of immunity from civil actions arising out of concerted efforts to persuade government to act in a public policy arena. After reviewing these authorities, we find them inapplicable to the case at hand. The *Webb* Court specifically observed that the petitioners in that case attempted to conduct their petitioning activity 'in the manner prescribed by statute and agency regulations.' [*Webb*.] Mr. Berrill, in contrast, disregarded the established procedures for offering public comment during a Board of Education meeting, interrupted the orderly conduct of the meeting, and thus utterly failed to conduct his petitioning activity 'in the manner prescribed by statute and agency regulations.'"

In another case, the Court held that filing a civil action was an exercise of the right to petition. Thus, an employer's discharge of an employee in retaliation for initiating a claim for overtime wages violated a substantial public policy and was actionable. *McClung v. Marion County Comm*. (1987).

6. Rights of Access

STATE ex rel. the HERALD MAIL
COMPANY v. HAMILTON,
165 W.Va. 103, 267 S.E.2d 544 (1980).

MILLER, Justice:

In this original writ of prohibition, the relator, The Herald Mail Company (Herald Mail), seeks to prohibit the enforcement of a closure order entered by the Circuit Court of Hardy County on February 27, 1980. The effect of this order was to bar members of the public and press from portions of a scheduled pretrial hearing in a murder case in which Robert M. Leach was the defendant.

Mr. Leach's counsel had filed with the trial court, in addition to a number of pretrial motions, a closure motion which in effect indicated that the defendant was willing to waive his right to a public and open pretrial hearing in order to avoid publicity that might jeopardize his right to a fair trial. Herald Mail, through one of its reporters, became aware of the closure motion and objected to it. The trial court permitted Herald Mail's counsel to appear and argue against the closure motion at a hearing on February 27, 1980. . . .

[The court granted] the closure motion in regard to "the admissibility of alleged statements made by the defendant to third parties and the evidence of defendant's mental state of mind at the time said statements were allegedly made . . . ." This language is contained in the court's order of February 27, 1980, which also held that "there is a clear and present danger of potential prejudice to the defendant's right to a fair trial should the public be allowed to hear the in camera proceedings."

It is this portion of the court's order granting closure which Herald Mail seeks to prohibit. At the February 27 hearing, of which a record was made, it was acknowledged by the trial court that "(t)here has been no undue publicity, and what has transpired in the community to date has been reserved, conservative and very proper." Defense counsel conceded at the hearing that as far as he could tell, "the press in this county . . . (has) . . . done nothing to prejudice Mr. Leach's right to a fair trial." Significantly, no facts were introduced at the hearing to show what publicity had been given to the case. Defense counsel did not specify how his client would be prejudiced if the suppression hearing were kept open.

Upon the joint motion of the prosecutor and the defense attorney, the court directed, by an order of February 6, 1980, that all the State's disclosures in response to defense discovery motions be sealed. At the February 27 hearing, the prosecutor and defense counsel agreed that the court could review this material to assist it in its ruling on the closure motion. The sealed disclosure material essentially consists of a lengthy written report of the State Police investigation of the murder which contained summary statements of witnesses, including those of several witnesses with whom the defendant allegedly discussed the crime after its commission.

Herald Mail urges that under Article III, Sections 14 and 17 of the West Virginia Constitution, the public and press have a right to be present during a criminal trial, including pretrial hearings. It also seeks to have this Court declare a right of access under our counterpart to the First Amendment to the United States Constitution – Article III, Section 7 of the State Constitution. We decline to decide this latter point, since the issue in this case can be resolved on the first constitutional ground.

I

Herald Mail recognizes that the claim it advances here was rejected by a sharply divided Court in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), and for this reason it seeks a resolution based on our State Constitution. The majority in Gannett held that the public has no constitutional right under the Sixth Amendment to the United States Constitution to attend criminal trials. This holding was predicated on the conclusion that the Sixth Amendment conferred the right to a public trial only on the accused and not on the public or press generally. As a consequence, the Court determined that the press, as a segment or agent of the public, had no constitutional right of access under the Sixth Amendment to a pretrial suppression hearing.

The crucial disagreement between the majority opinion and the dissent in Gannett involved whether the common law rule of open proceedings, applicable to both civil and criminal matters and requiring access by the public, had been incorporated into the public trial provision of the Sixth

Amendment. . . .

In the present case, we believe that our counterpart to the Sixth Amendment – Article III, Section 14 of the West Virginia Constitution--when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings.

Read literally, Article III, Section 14 is not simply a counterpart to the Sixth Amendment, for our constitutional provision does not couch the right to a public trial in terms of a right conferred on the defendant. Rather, it states a broader right: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be . . . public . . . ." [Thus], the right under our State Constitution is not limited by a reference to the accused, but mandates that the trial itself shall be public.

We have not had occasion to explore the public trial right under Article III, Section 14, to any great extent. In State ex rel. Varney v. Ellis, 149 W.Va. 522, 142 S.E.2d 63 (1965), we held in Syllabus Points 1 and 2:

> "Under Section 14 of Article III of the Constitution of West Virginia, it is mandatory that one charged with the commission of a crime be afforded a public trial."
>
> "One charged with a crime is not afforded a public trial within the meaning of Article III, Section 14, of the Constitution of West Virginia when his trial on said charge is held in the office of the county jailer."

The defendant in Varney sought a public trial, and this Court thus did not decide whether Article III, Section 14, confers a general right of access to the trial by the public. It cannot be doubted, however, that when the English common law right to a public trial, acknowledged in both the majority and dissenting opinions in Gannett, is construed in light of the history of the "open court" language found in Article III, Section 17 of our State Constitution, as well as the constitutions of other states, there emerges a clear constitutional mandate in this State requiring open public trials in criminal cases.

As Gannett recognized, the English common law rule of open proceedings became embodied in colonial charters and state constitutions in America.. . . .

The uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding. . . . Typical of the reasoning of these courts is E. W. Scripps Co. v. Fulton [Ohio App.], where the public interest was stated as follows:

> "It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice. The open courtroom is as necessary and important in the interest of supporting the administration of justice as in the protection of the rights of a member of the public when on trial for a criminal offense." * * * "(T)he defendants cannot waive the right of the people to insist that the proceedings of the courts, insofar as practicable and in the interest of the public health and public morals, be open to public view. . . . " . . .

On related issues, we have recognized the public's interest in the administration of our criminal justice system. In State v. Atkins, W.Va., 261 S.E.2d 55 (1979), in upholding the practice of allowing a private prosecutor to assist the official prosecutor in a case, we adverted to the public's interest in criminal trials by stating that "there may be those occasions when the employment of a private prosecutor would satisfy the public's concern that a given case not be given perfunctory treatment."

In State ex rel. Goodwin v. Cook, W.Va., 248 S.E.2d 602, 604 (1978), we held, in part, that citizens and taxpayers have standing "to challenge the constitutionality of a statute (W.Va.Code, 7-7-8, permitting the appointment of a special prosecutor) which not only affects the administration of justice, but requires the payment of public funds for a special prosecutor."

In State v. Gary, W.Va., 247 S.E.2d 420, 421 (1978), we held that before a trial court can deny bail or set bail at a given amount, it must hold a hearing and furnish a written statement of its reasons.

We stated that the hearing and statement of reasons had a larger purpose:

"(T)o provide the parties and the public the opportunity to realize that there is a careful, reasoned and judicious decisionmaking process at work on an important judicial issue . . . ."

Once the right in the public to attend the trial is acknowledged, the same right must be accorded members of the press. The press not only constitutes a part of the general public, but it is well established that it operates in a special capacity as an agent or surrogate for the general public in its gathering and dissemination of information. This special status rests on a realistic recognition that it is impossible for any meaningful number of the general public to abandon their daily pursuits to attend trials, and a further acknowledgement that the press has valuable expertise in ferreting out information difficult for the general public to obtain. . . .

However, it cannot be doubted, and relator here recognizes, that there are limits on access by the public and press to a criminal trial. In the area of criminal trials, a long-established constitutional right to a fair trial is accorded the defendant. This principle is found in the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and in Article III, Section 10 of our own Constitution, and is based on the recognition that widespread publicity may prejudice the defendant's right to a fair trial. . . . We need not attempt a complete assessment of the parameters of the area commonly called the "free press fair trial field," since we are deciding only when a pretrial criminal proceeding may be closed to members of the public and press.

Inherent in this question is our recognition that the term "trial" cannot be taken in its limited sense as that portion of the criminal proceeding which begins with the empanelling of the jury. This narrow view was accepted by the majority in Gannett but rejected by the dissent for reasons that we find compelling. The Gannett dissent made the practical observation that in many criminal cases, pretrial hearings may determine vital issues which can lead to the disposition of the entire case without a jury trial. Typically, pretrial hearings will involve claims relating to the voluntariness of the defendant's confession or matters involving the validity of warrants and evidence obtained thereunder that may be critical in proving the state's case.

In many instances, a pretrial hearing is like a trial without jury, since the trial judge is required to hear evidence and apply the law to the facts. Witnesses are sworn and the entire process is adversarial. The proceedings bear some analogy to other pretrial stages in a criminal case where the presence of the public and press has historically been allowed, such as in a preliminary hearing.

Interwoven into the delicate area of prescribing when the press may be precluded from attending a pretrial hearing is the fact that there are traditional judicial techniques which can be invoked to safeguard the defendant's right to a fair trial where press coverage is claimed to have prejudiced the prospective jury panel. As noted in Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), a change of venue, a thorough and individual voir dire of the jury, and the liberal use of challenges for cause, together with the traditional peremptory challenges, are available remedies to cure the effect of adverse pretrial publicity. Moreover, it is well within the bounds of judicial propriety to require that the parties not disclose their case in advance of trial to the press.

It should also be remembered that in many suppression hearings the issue is not primarily the substantive content of the evidence to be suppressed, but rather the procedural methods applied by law enforcement officials in obtaining the questioned material. Consequently, in these situations there is a reduced likelihood that the contents of documentary evidence will become known. Moreover, it is possible for the trial court, as was done in the present case, to provide in advance that the questioned material be kept sealed until the court's dispositional ruling is made.

In the present case, an issue raised was the mental condition of the defendant at the time he gave the third party incriminating statements. It is difficult to perceive how evidence offered at a pretrial hearing relating to his mental condition could create any substantial prejudice that would not exist if presented at trial. The fact that the defendant may incur prior to trial some adverse consequence, such as public disclosure of a possible defense, is not a sufficient reason to close the hearing.

It is but a truism to observe that in the ordinary criminal case, neither the public nor the press may

have any great interest in access. The problem will arise in the more controversial case, or in a case of great public moment, where the rights of the accused should be most zealously guarded. Yet, even in these cases, access cannot automatically be denied, even though prosecution and defense counsel may agree to its denial, for they cannot be the final arbiter of the right of the public and press to have access to the administration of justice.

In setting guidelines, we return to the primary purpose of closure, that of protecting the defendant's right to a fair trial, one free of widespread hostile publicity, so as to ensure him an unbiased jury. Absent a showing of widespread adverse publicity, the trial court should not grant a motion to close the hearing. Even where a clear showing is made as to widespread hostile publicity, this cannot end the inquiry. On a closure motion, the ultimate question is whether, if the pretrial hearing is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial. Factors bearing on the issue of irreparable damage include the extent of prior hostile publicity, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem. The trial court, upon ruling that a closure motion is warranted, must extend its order no further than the circumstances warrant, and must assign its reasons for granting the closure. . . .

As in so many areas of the law where both parties possess important rights, the task of setting the entire contour between their competing rights cannot be done by a single formula. The history of the law teaches that the wiser approach is to prescribe that course which can be discerned within the confines of the facts of the particular case. Few of us are endowed with the Einsteinian ability to formulate universal rules. We must be content to depend on the good judgment of a responsible press and our competent trial courts to apply this rule justly and fairly to each particular case.

In the present case, the defendant's motion for closure should not have been granted. The record fails to demonstrate facts which would compel a conclusion that widespread publicity prejudicial to the defendant existed. . . .

McGRAW, Justice, concurring:

The majority deserves accolades for their recognition that our state Constitution guarantees the public and thereby the press a right of access to judicial proceedings. The error in its well-crafted opinion is that it limits, albeit in narrow circumstances, the people's right of such access. . . .

The right of access to governmental proceedings and the right to a fair trial do not conflict. The judicial article of the Constitution charges this Court to devise procedures and remedies to ensure fair trials. W.Va.Const. art. 8, § 3. The Court is not empowered to abridge constitutional guarantees to that end. Traditional judicial techniques are more than equal to the task. The majestic literature of common law jurisprudence bears windy witness to the flexibility of judicial device and to the boundless promise of judicial ingenuity.

The public is entitled to know how its government operates in order to secure it against "the danger of maladministration" spoken of in article 3, section 3 and to ensure that officials, even judges, remain true to their trust as servants of the people. W.Va.Const. art. 3, §§ 2, 3.

Our Bill of Rights does not anticipate superior and inferior classes of rights and it is improperly, even unlawfully presumptuous for us to suggest that the abridgment of one is necessary to the preservation of another.

DAILY GAZETTE CO., INC. v.
The COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,
174 W.Va. 359, 326 S.E.2d 705 (1985).

Chapter 2

McGRAW, Justice:

This mandamus action arises from a disciplinary action against Weirton attorney Leonard Z. Alpert. The petitioner, The Daily Gazette Company, Inc., sought to compel the respondent, the Committee on Legal Ethics of the West Virginia State Bar, to release information concerning its investigation of Alpert made pursuant to this disciplinary action. Because Alpert agreed, however, on July 5, 1984, to the release of the record in his disciplinary proceeding, the petitioner's request is rendered moot. Nevertheless, important issues raised by the petitioner remain concerning the confidentiality of records relating to attorney disciplinary proceedings conducted by the respondent. Essentially, as phrased by the petitioner, the greater issue in the present proceeding is whether the respondent must "open its disciplinary procedures to public scrutiny." Although the issue of public access to the record in Alpert's disciplinary proceeding is now moot, a brief discussion of the facts surrounding his case is warranted to illuminate the impetus behind the petitioner's request for prospective relief and to provide a context for analysis of the issue of public access.

I

On February 6, 1979, Alpert was indicted on federal racketeering charges. Alpert's trial, involving charges that he had paid the Hancock County sheriff $2,500 in exchange for the return of six slot machines which had been confiscated and were to be destroyed pursuant to court order, received extensive publicity through the State of West Virginia. Eventually, Alpert was acquitted of all charges. In March 1981, however, the federal district judge who presided over Alpert's case released evidence concerning Alpert to the Committee on Legal Ethics, which was conducting its own investigation of whether disciplinary action should be taken in response to potential ethical violations incident to the allegations of criminal misconduct.

Following the transmittal of evidence to the Committee on Legal Ethics, the petitioner requested information on numerous occasions concerning the disposition of any ethical charges against Alpert. Not only did the Ethics Committee steadfastly refuse to disclose such information, it would not even confirm or deny that an investigation had been initiated. This refusal was based upon article VI, § 30 of the West Virginia State Bar By-Laws, which provides that, except in certain circumstances,[12] all information regarding attorney disciplinary proceedings is confidential. . . .

III

As this Court stated in Committee on Legal Ethics v. Mullins, 159 W.Va. 647, 651, 226 S.E.2d 427, 428 (1976), "the primary purpose of the ethics committee is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys...."

. . . The privileges attendant to being licensed to practice as an "attorney at law" are not without concomitant obligations. These obligations include a fundamental public duty to assist the courts in the administration of law and resolution of legal controversy. See State ex rel. McCamic v. McCoy, 276 S.E.2d 534, 536 (W.Va.1981), quoting, In re Eary, 134 W.Va. 204, 208, 58 S.E.2d 647, 650 (1950). As officers of the court and licensed ministers of the system of justice, lawyers are accountable to the public for their conduct. Therefore, the principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice.

One fundamental aspect of our Anglo-American system of justice is its openness. In State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 547-49 (W.Va.1980), this Court traced the common law origins of the "open courts" provision contained in our own and in other state constitutions. One

[12]The general exceptions to this confidentiality rule are: (1) when a recommendation for public discipline is filed with this Court by the Ethics Committee; (2) when the lawyer who is the subject of Ethics Committee action requests public disclosure; or (3) when the Ethics Committee investigation is predicated upon a criminal conviction of the subject lawyer. See West Virginia State Bar By-Laws art. VI, § 30.

reason for this provision, as was noted in Hamilton, 267 S.E.2d at 548, quoting 1676 Charter of Fundamental Laws, of West New Jersey, ch. XXIII, is to ensure "that justice may not be done in a corner nor in any covert manner." This Court further noted in Hamilton, 267 S.E.2d at 548, that:

> The uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding. (Citations omitted).

This fundamental constitutional right of access is not limited to formal trials, but extends to other types of judicial and quasi-judicial proceedings. For example, in Hamilton, 267 S.E.2d at 551, this Court recognized a public right of access to pretrial hearings in criminal cases. . . .

In Syllabus Point 2 of Committee on Legal Ethics v. Graziani, supra, this Court noted that, "Disciplinary proceedings are neither civil actions nor criminal prosecutions but are special proceedings which are peculiar in nature.". . . This unique nature of attorney disciplinary proceedings, however, does not exempt such proceedings from the requirements of West Virginia Constitution art. III, § 17. In fact, this uniqueness intensifies the desirability of openness and candor. Procedures governing professional discipline are emblematic of the character of a profession. Confidentiality favors insulating the legal profession from adverse publicity over the public interest in the proper administration of justice. We therefore hold that under West Virginia Constitution art. III, § 17, which provides that "The courts of this State shall be open," there is a right of public access to attorney disciplinary proceedings. We must define, however, the parameters of this right.

IV

We begin our analysis of the right of public access to attorney disciplinary proceedings by noting that Article VI, § 30 of the By-Laws imposes overly broad restrictions upon public access to ethics complaints and proceedings. The rule shrouds in secrecy that which is intended to be carried on for the public's benefit. The State, through its judicial branch, has the power and the duty to require that those individuals licensed by the State to practice law live up to the professional standards promulgated to protect the general welfare of the people, and to that end, "the public should know when attorneys, as officers of the court, are charged with disloyalty thereto. It is only through the possession of such knowledge that the people can intelligently deal with the members of the legal profession and intrust business to them."

. . . Moreover, if the legal profession's practice of self-regulation is to remain viable, the public must be able to observe for themselves that the process is impartial and effective. We cannot simply expect the public to blindly accept that justice is being done. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

The Committee on Legal Ethics is dominated by lawyers, who are charged with the responsibility of scrutinizing the conduct of other lawyers. Carrying on this process in secrecy "denies the public information that would demonstrate the profession's concern for effective disciplinary enforcement and show the steps taken by the bar to maintain its integrity." ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970) at 143. Disciplinary proceedings are "an increasingly important method of demonstrating the trustworthiness of the legal profession and ensuring the effectiveness of the judicial process." . . .

V

Article VI, § 43 of the By-Laws, which is designed to encourage the filing of valid complaints, grants absolute libel immunity to complainants under the attorney disciplinary system, even to those who file groundless or malicious complaints. Therefore, we recognize that during the initial investigatory stage there is a valid interest in providing protection against unwarranted injury arising from unsupported complaints which are privileged under article VI, § 43 and thus, cannot be the

subject of libel actions. Additionally, disclosure of facts regarding a complaint prior to the filing of formal charges can impair the investigatory function of the State Bar. However, as the Alpert case illustrates, if a case terminates in dismissal, either before or after the filing of formal charges, or with the issuance of a private reprimand, the confidentiality rule contained in article VI, § 30 generally prevents the public from ever learning of the existence of the complaint or charges, and the ultimate disposition thereof. Less restrictive means to protect the limited need for confidentiality do exist. The confidentiality rule, in three respects, impermissibly restricts public access.[14]

First, once it is determined that there is probable cause to issue a formal charge, the constitutionally recognized interests served by public disclosure outweigh any necessary restrictions upon access to information for the benefit of individual attorneys or the profession as a whole. Therefore, in cases where formal disciplinary charges in an attorney disciplinary proceeding are filed, following a determination that probable cause exists to substantiate allegations of an ethical violation, the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and nondeliberative materials introduced at such hearing, must be publicly accessible, including the record of the final action taken.

Second, information regarding complaints dismissed without formal charges under article VI, § 12 of the By-Laws is a necessary and vital component of the whole public process. While we recognize that there are reputational and investigatory justifications to restrict disclosure of information pertaining to complaints during the initial investigatory stage, those justifications are limited.[17] Under West Virginia Constitution art. III, § 17, the judicial branch and its agencies are required to be fully accountable to the public. Therefore, once a complaint of unethical conduct in an attorney disciplinary proceeding is dismissed for lack of probable cause, the public has a right of access to the complaint and the findings of fact and conclusions of law which are presented in support of such dismissal.

Third, it should be clear from the foregoing discussion that use of private reprimands by the State Bar as a method of official discipline is in direct contravention with the "open courts" provision of West Virginia Constitution art. III, § 17. The disciplining of attorneys is performed for the benefit of the public, and therefore "is the public business and should not be disposed of in other than a public manner." . . . Accordingly, we hold that the right of public access to attorney disciplinary proceedings precludes utilization of private reprimand as a permissible sanction.

Article VI, § 17 of the By-Laws sets out the available discipline alternatives, including the alternative of imposing private reprimands. Although we are scrutinizing provisions which are subject to revision upon this Court's order, the statutory construction principles embodied in the doctrine of "least intrusive remedy" as articulated and summarized in In re Dostert, 324 S.E.2d 402

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[14]We note that prior to and independent of the institution of this action by the petitioner, the State Bar, upon the request of the Chief Justice and the Court Administrator, prepared amendments to the confidentiality provisions of section 30 which would provide greater public access. Amendments to article VI, § 30 were subsequently submitted to this Court for approval. See Petition to Amend Rules of Disciplinary Procedure in Article VI of the By-Laws of the West Virginia State Bar (filed Sept. 11, 1984, in the office of the Clerk of the Supreme Court). These amendments provide for public access to complaints, reports, records and nondeliberative proceedings once formal disciplinary charges have been brought against an attorney. However, for reasons stated in this opinion relating to private reprimands and access to information concerning dismissals without charges, these proposed changes fail to satisfy the public access requirements of West Virginia Constitution art. III, § 17.

[17]The reporting of the existence of groundless or frivolous complaints after there has been a decision to dismiss them as such poses no real threat to the reputations of attorneys. Moreover, information on the disposition of all complaints not only serves the objective of accountability, but also promotes a greater flow of information from the most substantial source of information pertaining to ethical violations, the public. Accountability for all decisions can only bolster confidence in this self-regulatory process, and at the same time, increase the likelihood of receiving information concerning attorney misconduct. See Steel & Nimmer, Lawyers, Clients, and Professional Regulation, [1976 A.B.F. Res. J. 919, 1004.]

at 412-413 (W.Va. Nov. 7, 1984), provide the most expeditious means to correct the constitutional defect contained in article VI, § 17 of the By-Laws. Therefore, rather than invalidating this section in its entirety, the unconstitutional reference to private reprimands is hereby severed.

In addition to the constitutionally defective By-Law provisions already touched upon, certain procedural provisions of the State Bar's Rules and Regulations are also in conflict with West Virginia Constitution art. III, § 17. Chapter III, § 10 of the Rules and Regulations provides that cases may be closed without providing an explanation of the reason for their disposition. This regulatory assertion contradicts the most fundamental concepts of accountability. With respect to any judicial or quasi-judicial proceeding, the public must always be afforded "the opportunity to realize that there is a careful, reasoned and judicious decision-making process at work...." . . .

Accordingly, we hold that the By-Laws and Rules and Regulations of the West Virginia State Bar which govern public disclosure of lawyer disciplinary matters are unconstitutional under [art. III, § 17,] when they fail to protect and vindicate the public's interest in the integrity of the judicial system by unreasonably restricting access to information concerning formal disciplinary actions against lawyers, integral parts of the judicial system. . . .

NEELY, Chief Justice, dissenting:

I dissent not so much to the majority's holding but rather to the tone of today's opinion. The Court this day implies that the Legal Ethics Committee of the West Virginia State Bar has somehow consciously gone about "shrouding its proceedings in secrecy" to avoid the public's (vide the press') scrutiny. Since its inception, the Legal Ethics Committee has served this Court, the bar, and the citizens of our state with admirable devotion to fairness and the truth. I think a firm handshake and the words "well done good and faithful servant" are more in order.

...I believe that the majority was too expansive in setting the "parameters" of the public's access to lawyer disciplinary proceedings.

NOTE

In *State ex rel. Garden State Newspapers v. Hoke, Inc.*, 205 W.Va. 611, 520 S.E.2d 186 (1999), the Court held that Article III, § 17's Open Courts Clause "guarantees a qualified constitutional right on the part of the public to attend civil court proceedings" and that records relating to court actions are presumptively open to the public. At the same time, the Court recognized that the Legislature may overcome that presumption to protect individual privacy and that judges may, even in the absence of an applicable statute, close certain proceedings and records to protect the interests of a juvenile. The decision did not specify any standard that the Legislature must satisfy to sustain the closure of an entire class of cases, but the Court did set forth the analysis that judges must use when confronted with a closure request:

> [W]e hold that the qualified public right of access to civil court proceedings guaranteed by Article III, Section 17 of the Constitution of West Virginia is not absolute and is subject to reasonable limitations imposed in the interest of the fair administration of justice or other compelling public policies. In performing this analysis, the trial court must first make a careful inquiry and afford all interested parties an opportunity to be heard. The trial court must also consider alternatives to closure. Where the trial court closes proceedings or seals records and documents, it must make specific findings of fact which are detailed enough to allow appellate review to determine whether the proceedings or records are required to be open to the public by virtue of the constitutional presumption of access.

The civil action in that case concerned an attempt by a high school student and his father to enjoin a public school from disciplining the student and necessarily required evidence about the juvenile's conduct and submission of educational records. The Court concluded that safeguarding the minor's

privacy interests presented a "compelling state interest" that warranted a complete closure of the judicial proceedings and records.

7. Privileges of the Press

STATE ex rel. HUDOK v. HENRY, 182 W.Va. 500, 389 S.E.2d 188 (1989).

MILLER, Justice:

In this original proceeding in prohibition, we are asked to determine the extent of a news reporter's privilege to decline to answer questions or to divulge information obtained in the course of his news-gathering function. The privilege is asserted under the free press clause of the First Amendment to the United States Constitution, as well as under Article III, Section 7 of the West Virginia Constitution. The reporters, Ron Hudok and Natasha Singh, contend that the Honorable Patrick G. Henry, III, Judge of the Thirty- First Judicial Circuit, acted beyond his legitimate authority in finding them in contempt for failing to answer questions at an administrative hearing to contest the discharge of Linda Butner from her job as clerk of the Magistrate Court of Jefferson County.

I.

This controversy arose after Mrs. Butner spoke to Ron Hudok, a reporter with The Martinsburg Evening Journal, with regard to a search of her home by sheriff's deputies pursuant to a warrant. In this interview, published in the paper on April 11, 1989, under Mr. Hudok's by-line, Mrs. Butner claimed that the sheriff had used the search "to get his name out of the limelight." She also indicated that the affidavit for the warrant was "sloppy" in that it contained a number of typographical errors.

On May 15, 1989, Mrs. Butner was placed on a thirty-day administrative leave by one of the respondent judges, the Honorable Thomas W. Steptoe, Jr., Judge of the Twenty-Third Judicial Circuit. Subsequently, on May 26, 1989, the paper published another interview with Mrs. Butner under the by-line of Beth Traubert. In this article, it was reported that Mrs. Butner had appeared before the Jefferson County Commission complaining that the sheriff was attempting to set her up as a drug pusher. The article pointed out that Mrs. Butner's husband had previously been arrested for cultivating marijuana, but that she had not been charged with any wrongdoing.

On June 6, 1989, Judge Steptoe entered an order removing Mrs. Butner as magistrate clerk. Mrs. Butner requested an administrative hearing to protest her firing.

An evidentiary hearing was set for September 18, 1989, before a hearing examiner. Both newspaper reporters were subpoenaed by Judge Steptoe to support his case for firing Mrs. Butner. In addition, Judge Steptoe issued a subpoena to Natasha Singh, a reporter for a local radio station. Ms. Singh had conducted an interview with Mrs. Butner which had never been made public. Judge Steptoe had become aware of the interview and called Ms. Singh on the telephone. According to Judge Steptoe, when asked if Mrs. Butner had made comments about the sheriff, Ms. Singh responded that Mrs. Butner had nothing nice to say about him.

At the administrative hearing, Mrs. Butner admitted that the comments attributed to her in the May 26, 1989 newspaper article were essentially correct. Ms. Traubert was released from her subpoena and was not required to testify. Judge Steptoe then questioned Ms. Singh as to whether Mrs. Butner had been critical of the sheriff in her interview. Despite her claim of a First Amendment news-gathering privilege, Ms. Singh was ordered by the hearing examiner to answer Judge Steptoe's question. Ms. Singh refused to respond on First Amendment grounds. Mr. Hudok was also required to take the stand. He responded to several preliminary questions, but when asked whether Mrs. Butner had made the remark, "I feel we were used by the sheriff to get his name out of the limelight," he declined to answer, claiming a First Amendment privilege.

The administrative hearing was adjourned, and the next day a contempt ruling was sought from Judge Henry, who concluded that Mr. Hudok and Ms. Singh were in civil contempt for refusing to testify. He ordered them to be incarcerated until they purged themselves of contempt by responding to the questions. This order was stayed to allow application to this Court.

II.

In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court first had occasion to decide whether a reporter could claim a privilege under the First Amendment to refuse to disclose confidential sources to a grand jury engaged in a criminal investigation. The Court declined to find such a privilege based on the reporter's claim that disclosure would cause substantial interference with news gathering and breach the confidentiality of news sources vital to a free and independent press. It is generally recognized, however, that Branzburg does stand for a qualified privilege.[4]

Following Branzburg,[5] most courts have formulated a balancing test patterned after Justice Stewart's dissent in Branzburg[6] and summarized in In Re Petroleum Products Antitrust Litigation, 680 F.2d 5, 7 (2d Cir.):

> "The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."...

Branzburg involved a reporter who had been subpoenaed to testify before a grand jury investigating drug dealing based on two articles written by the reporter from personal observation. The reporter refused to identify the persons who were involved in the drug episodes that he had witnessed and who formed the basis of his articles. Branzburg's underpinning was the obvious public importance of effective criminal investigation and the duty of citizens to furnish to a grand jury relevant information regarding criminal activity of which they are knowledgeable.

In this case, we do not deal with a grand jury subpoena, but with a subpoena issued for an administrative hearing. Courts have been more reluctant to enforce subpoenas against reporters in civil or administrative proceedings. As the court stated in Zerilli v. Smith, 211 U.S.App.D.C. 116, 123, 656 F.2d 705, 712 (1981): "Every other circuit that has considered the question has also ruled

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[4]Branzburg was decided on a 5-4 vote. Justice White, writing for the majority, made this observation: "[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." . . .

Justice Powell, whose concurrence made the fifth vote, spoke of the "limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with regard to the gathering of news or in safeguarding their sources." ... He outlined a balancing test and concluded that if a newsperson "is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation," he would be [within] First Amendment protection....

[5]Prior to Branzburg, the cases generally involved reporters who claimed an absolute privilege against testifying before a grand jury. The courts refused to uphold this position. . . .

[6]Justice Stewart wrote:

> "Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought.
>
> "Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. . . . They must demonstrate that it is reasonable to think the witness in question has that information. . . . And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties." . . .

that a privilege should be readily available in civil cases, and that a balancing approach should be applied."[9] Zerilli also recognized the distinction between civil actions in which the reporter is a party and those in which he is not. Where the reporter is a party, and particularly in a libel action, "the equities weigh somewhat more heavily in favor of disclosure." 211 U.S.App.D.C. at 125, 656 F.2d at 714.[10]

In this case, there was no confidential informant. Mr. Hudok's article disclosed Mrs. Butner's name. Indeed, it was her comments therein that led, in part, to her termination. Because Ms. Singh disclosed to Judge Steptoe that she had interviewed Mrs. Butner, much the same situation exists. The only difference is that Ms. Singh did not publish the results of her interview.

The parties do not discuss whether the nonconfidentiality of the source should be a determinative factor in deciding whether a qualified privilege exists. As we have earlier pointed out, courts have considered the qualified privilege to rest on two general grounds: (1) the protection of confidential sources which is often critical to news gathering, especially on sensitive subjects where a promise of anonymity is often the only way in which the reporter can obtain information and develop news leads, and (2) the news-gathering function itself would be substantially hampered and the free flow of information to the public would be impinged if newspersons could be routinely subpoenaed. Most courts that have confronted this latter question have held that the mere fact that there is no confidential source will not bar the exercise of the qualified privilege. . . .

We find these principles to be well established and to follow our understanding of the First Amendment free press clause. In State ex rel. Daily Mail Publishing Co. v. Smith, 161 W.Va. 684, 690, 248 S.E.2d 269, 272 (1978), aff'd, 443 U.S. 97 (1979), we "concluded that a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent operation of a democratic society." . . .

The view of the First Amendment adopted by the majority of jurisdictions since Branzburg seems to be eminently fair and workable. To our knowledge no court has adopted an absolute privilege against disclosure by reporters without regard to a vital societal need for the information. As we have already pointed out, these cases from other jurisdictions make it clear that the privilege applies to not only confidential sources, but to information obtained in the regular news-gathering process. Furthermore, it is recognized that this qualified privilege will yield in proceedings before a grand jury where the reporter has personal knowledge or is aware of confidential sources that bear on the criminal investigation, but will be more vigorously applied with regard to civil cases, except those in the libel area.

We recognize that there may be those occasions when a newsperson is the only individual with credible evidence that bears upon an important issue in civil litigation. In this situation, there may

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[9]For this proposition, the Zerilli court cited these cases: "Riley v. City of Chester, 612 F.2d 708, 715-716 (3d Cir.1979) (upholding assertion of privilege); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-438 (10th Cir.1978) (same); Baker v. F & F Investment, [470 F.2d 778] at 783 . . . (same); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.1972) (same); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir.1980) (ruling that privilege does not prevail); see also Democratic Nat'l Committee v. McCord, 356 F.Supp. 1394, 1398 (D.D.C.1973) (upholding privilege); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F.Supp. 1197, 1203 (N.D.Ill.1978) (same); Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia, 443 F.Supp. 489, 491 (E.D.Pa.1977) (same); Gilbert v. Allied Chemical Corp., 411 F.Supp. 505, 508 (E.D.Va.1976) (same)." . . .

[10]Zerilli, 211 U.S.App.D.C. at 125, 656 F.2d at 714, made this statement: "As we suggested in Carey v. Hume, [160 U.S.App.D.C. 365], 492 F.2d [631] at 634, 636-639 [cert. dismissed, 417 U.S. 938, 41 L.Ed.2d 661, 94 S.Ct. 2654 (1974)], this will be particularly true in libel cases involving public officials or public figures where the rule of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), applies." The United States Supreme Court in Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), considered at some length the related question of the extent to which the plaintiff, a public figure, could, through discovery in a libel action, explore the motives and the editorial process of the press persons who had produced an alleged defamatory article.

be no alternative under principles of due process other than to require such testimony. This narrow rule is justified by the fact that the media is given broad access to accident scenes as well as to the inner offices of government buildings and other places where they may be the only witnesses to a crucial statement or event.

Finally, where the reporter is not engaged in the news-gathering function, he is subject to giving testimony as to what he observed to the same extent as any other witness. Thus, we conclude that to protect the important public interest of reporters in their news-gathering functions under the First Amendment to the United States Constitution, disclosure of a reporter's confidential sources or news-gathering materials may not be compelled except upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

When we apply these principles to the present case, we find that the trial court erred in holding these reporters in contempt. The trial court rested its holding on the belief that there was no qualified privilege available because there were no confidential sources. As we have earlier pointed out, the general rule is that a qualified First Amendment privilege is available to the news-gathering material whether confidential, published, or not published.

In this case, relevance of the information sought to the main purpose of the discharge was tenuous at best. As earlier noted, Mrs. Butner was an at-will employee and could have been terminated from her position as clerk of the Magistrate Court of Jefferson County without any reason. The chief ground for her termination was that she had made detrimental public statements about her husband's criminal case, which was pending in the magistrate court. It was on this basis that Mr. Hudok's April 11, 1989 news article was relevant.

It appears that Mrs. Butner admitted making the remarks attributed to her in the May 26, 1989 article. These remarks, commenting on a pending criminal proceeding, were far more serious than the rather mild statement made in the April 11, 1989 article to the effect that "I feel we were used by the sheriff to get his name out of the limelight." When asked about the latter statement by Judge Steptoe, Mrs. Butner stated that she was unsure whether she or her husband had made it. Judge Steptoe called Mr. Hudok to impeach Mrs. Butner's testimony. Mr. Hudok's refusal to testify as to the statement led to his contempt citation. In view of Mrs. Butner's acknowledgement of the statements she made in the May 26, 1989 article, we find this impeachment was not critical to the maintenance of Judge Steptoe's claim. The First Amendment qualified privilege should have prevailed.

Much the same may be said of Ms. Singh's refusal to disclose the contents of her interview with Mrs. Butner. The charge made against Mrs. Butner concerned her public comments. The record does not disclose that Ms. Singh published Mrs. Butner's interview. Again, in light of the specific statements made and acknowledged by Mrs. Butner in the May article, Ms. Singh's general statement that Mrs. Butner was critical of the sheriff is neither that highly material nor so relevant to the case as to warrant breaching the qualified privilege.

We conclude that the respondent judge has exceeded his legitimate powers in holding the reporters in contempt, and thus his ruling is subject to a writ of prohibition[.] . . .

CITIZEN AWARENESS REGARDING EDUCATION v. CALHOUN COUNTY PUBLISHING, INC.,
185 W. Va. 168, 406 S.E.2d 65 (1991).

NEELY, Justice

This is an appeal by Calhoun County Publishing, Inc. of the Calhoun County Circuit Court's injunction compelling it to accept and print a paid political advertisement submitted by a local

political action committee. We hold that the lower court's injunction violated the federal guarantee of a free press contained in U. S. Const., amend. I, and our own guarantee of a free press contained in W. Va. Const., art. III, § 7.

Appellant Calhoun County Publishing, Inc., publishes a weekly newspaper, the Calhoun Chronicle, in Calhoun County, West Virginia. Appellee Citizen Awareness Regarding Education (hereinafter "CARE") is a political action committee formed to oppose a school bond levy that was scheduled for a vote at the 8 May 1990 primary election.

In its 12 April, 19 April, and 26 April editions, the Calhoun Chronicle published several paid political advertisements placed by CARE. However, when CARE attempted to place an advertisement in the 3 May 1991 edition, the newspaper refused to print it, because the newspaper apparently had a policy of not publishing any political advertisements in the last issue before an election.

On 1 May 1990, CARE filed a complaint and motion for mandatory injunction in the Circuit Court of Calhoun County, seeking an order compelling the newspaper to publish CARE's advertisement. Several hours after the filing of the complaint and motion, the circuit judge conducted a hearing on CARE's complaint.

The newspaper was unable to procure counsel before the proceeding. At the hearing, CARE's counsel candidly admitted that she could not cite any cases to support CARE's position:

> I have brought this forward out of a gut sense, my arguments are based on decency and fair play and basic sense of Constitutional Law. I really cannot site [sic] any cases because of the shortness of notice and the pressure under which I had to prepare this work.

The court, likewise, noted the lack of authority for compelling the newspaper to print the advertisement, yet granted the injunction CARE requested, apparently on the same gut sense.

I

As a threshold matter, it should be noted that although this case is technically moot because the advertisement has been run and the election is over, we can still address it, because, as we said in Syllabus Point 1 of Means v. Sidiropolis, W. Va. , 401 S.E.2d 447 (1990):

> This Court, in its discretion, may decide a case that is technically moot if the issue presented by the case can be repeatedly presented to the trial court yet escape review at the appellate level because of its fleeting and determinate nature.

Although CARE's counsel had only a short time to search for precedent, the fact is that there exists no support for the injunction CARE sought. The United States Supreme Court announced the law governing this case in Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), in which the Court reaffirmed the First Amendment's guarantee of a free press. . . .

In Miami Herald, the Supreme Court struck down a Florida "right-of-access" statute that required any newspaper that assailed a candidate for election to give free space to the candidate for his rebuttal. The Court examined the various arguments for "right-of-access" provisions, but ultimately found that any right-of-access provision would run afoul of the First Amendment's protection of freedom of the press:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years. . . .

In the final paragraph of the majority opinion, the Court left no doubt about the boundaries of the press's freedom with regard to deciding what to print and what not to print:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and

advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. ....

If the trial court or CARE's lawyer felt that there might be some precedent for the injunction, perhaps they vaguely recalled the case of United Mine Workers of America v. Parsons, W. Va. , 305 S.E.2d 343 (1983), which involved radio broadcasts produced by the Department of Intercollegiate Athletics at West Virginia University. In Syllabus Point 1 of that case, we said:

When a state agency or instrumentality sells advertising for broadcast which presents one side of a politically controversial issue of public concern, it is obligated under W.Va. Const. art. III, § 3 and art. III, § 7, to preserve its neutrality by providing a reasonable opportunity for the presentation of contrasting points of view in order that the "common benefit, protection and security" be served and fundamental fairness preserved. . . . Even when announcing this rule, the court specifically recognized that under Miami Herald v. Tornillo, the same "right-of-access" rule could not be applied to a private newspaper.

In short, government can never compel a private newspaper to print anything, without violating the First Amendment's guarantee of a free press.

We hold that W. Va. Const., art. III, § 7, was intended to provide at least as much protection to the press as the First Amendment to the Constitution of the United States provides. Therefore, the circuit court's injunction violated our state constitution's guarantee of a free press, as well. . . .

B. Freedom of Religion

Read Article III, §§ 11, 15, 15a.

1. "Establishment" of Religion

JANASIEWICZ v. BOARD OF
EDUCATION OF THE COUNTY
OF KANAWHA,
171 W.Va. 423, 299 S.E.2d 34 (1982).

HARSHBARGER, Justice:

Petitioners have school-age children enrolled in Catholic schools in Kanawha County, West Virginia. They have asked us to require the county Board of Education to provide school bus transportation for their children to and from parochial schools. The board has provided a monetary stipend to parents of parochial school students and permits the children to ride school buses on established public school bus routes.

The petitioners say that the Board has not complied with State ex rel. Hughes v. Board of Education, 154 W.Va. 107, 174 S.E.2d 711 (1970). Hughes involved this same class of petitioners, the same respondent, and the same issue: whether W.Va.Code, 18-5-13(6)(a) allows a county school board to provide bus transportation to sectarian school students, and if so, whether this provision violates our state or federal constitutions. Its Syllabus Point 2 determined:

When a county board of education has provided a system for the transportation of school children by bus, pursuant to the provisions of Code, 1931, 18-5- 13(6), as amended, the refusal of the county board of education to provide such transportation to certain children of the county, merely because they attend a Catholic parochial school, denies to such children and their parents the equal

> protection of the laws which is guaranteed by the Fourteenth Amendment of the Constitution of the United States and also denies to such children and their parents their right to religious freedom guaranteed by the First Amendment of the Constitution of the United States and by Section 15 of Article III of the Constitution of West Virginia.

The Board of Education asks us to reconsider Hughes, but petitioners contend that the issue is res judicata to these parties. If Hughes is wrong, it is not immutable no matter who challenges it. See, e.g., Griffin v. State Board of Education, 296 F.Supp. 1178, 1182 (E.D.Va.1969). Res judicata and stare decisis are important judicial doctrines, but needs for consistency, stability and predictability cannot perpetuate incorrect interpretations or misapplications of laws or legal principles. Ohio Valley Contractors v. Board of Education of Wetzel County, W.Va., 293 S.E.2d 437 (1982); Syllabus Point 13, Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975).

We maintain Hughes' rule, with which a majority of courts that have decided the question have agreed, that providing bus transportation for parochial school children does not violate our First Amendment establishment clause or W.Va.Const. art. III, § 15. Those other courts generally focus upon the child benefits and diminish whatever religiosity there may be, in transporting children to parochial schools. [E.g., Everson v. Board of Education, 330 U.S. 1 (1947).] ...

But Hughes was wrongly decided on its Fourteenth Amendment equal protection issue. The equal protection clause is not violated by failure by a state to aid and support parochial or private schools. The United States Supreme Court explained in Norwood v. Harrison, 413 U.S. 455, 462 (1973):

> In Pierce [v. Society of Sisters, 268 U.S. 510 (1925)], the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.
>
> ... Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education.

Later in that opinion the court recognized that the Federal Constitution values the free exercise of religion and that therefore a state may provide "neutral" services to sectarian schools:

> This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors. [Norwood.]

Hughes antedated this and other Supreme Court and federal cases which have indicated that the Fourteenth Amendment permits, but does not require, expenditure of government funds on parochial students. . . . We find that Hughes' equal protection argument is an improper constitutional analysis and cannot be continued in our law. . . .

NOTE ON ARTICLE III, § 15a

In 1984, West Virginia's voters overwhelmingly approved the "Voluntary Contemplation, Meditation or Prayer in Schools Amendment." Inserted into Article III as § 15a, the Amendment provides:

> Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer.

> No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.

Shortly after the Amendment was put into practice, however, a federal judge declared it to be unconstitutional and enjoined the defendant class of authorities from the State and the 55 county school systems from any further implementation. *Walter v. West Virginia Board of Education*, 610 F.Supp. 1169 (S.D.W.V. 1985). The Court applied the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has generally controlled analysis under the Establishment Clause in the First Amendment to the United States Constitution. To survive a challenge under that test, a statute must have a secular purpose, its principal or primary effect may not advance or inhibit religion, and it must not result in an excessive entanglement between church and state. The *Walter* court found that § 15a failed each prong. The court characterized the section as a "hoax conceived in political expediency." A short time later, the U.S. Supreme Court invalidated, on Establishment Clause grounds and using the *Lemon* test, a similar Alabama statute. *Wallace v. Jaffrey*, 478 U.S. 38 (1985). (That decision probably explains West Virginia's decision not to appeal *Walter*.)

Nevertheless, § 15a cannot be ignored. Recent Supreme Court decisions have softened somewhat the Establishment Clause analysis, and other courts have sustained laws and programs that merely provided for moments of silence. In addition, the *Walter* court enjoined enforcement of only § 15a's first sentence. Thus, the second sentence, protecting the rights to meditate and pray and to be free of coercion in those matters, remains in effect. It is unclear, however, whether that sentence adds anything to the rights already guaranteed by Article III, §§ 7 and 15, as well as by the federal First Amendment.

2. "Free Exercise" of Religion

[Some of the commentary in this section is extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 126-28 (2nd ed., Oxford University Press, 2016).]

The West Virginia Court has dealt with surprisingly few issues regarding the right of individuals to the free exercise of religion (that is, to follow a particular religious belief or to engage in a particular religious practice). In an easy free exercise case, the Court found that a circuit judge violated a mother's right under § 15 when he modified a divorce decree to enjoin her from using her home to hold meetings for Jehovah's Witnesses. *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959). The more difficult determinations arise when an individual seeks to be excepted from a law of general applicability because compliance with the rule would compromise the person's religious beliefs. To resolve such conflicts, the Court has balanced the state interest in denying the exception against the intrusion on the individual's religion. *In re Kilpatrick*, 180 W.Va. 162, 375 S.E.2d 794 (1988), held that compelling state interests in protecting public health supported a requirement that applicants for a marriage license undergo blood tests. The need for the minimally intrusive tests outweighed the religious freedom of two applicants who claimed submitting to the test would violate a canon of their faith. But in *State v. Everly*, 150 W.Va. 423, 146 S.E.2d 705 (1966), the Court allowed an exemption from grand jury duty to a Jehovah's Witness who asserted his service as a juror would transgress his religious convictions. The state's interests in administering a grand jury, admittedly important, were not threatened because granting the exception would not seriously, or even minimally, impair the county's ability to secure an adequate pool of competent jurors. By contrast, granting the exception in Kilpatrick could have directly interfered with the State's interest in preventing the spread of sexually communicable diseases and protecting the health of future children.

The West Virginia Constitution does present one other Free Exercise issue. That rests in Article VI, § 47, which provides that "[n]o charter of incorporation shall be granted to any church or

religious denomination." Although the point has not been addressed in the cases interpreting § 47, it is at least arguable that § 47 violates the Free Exercise Clause in the First Amendment to the United States Constitution by discriminating against religious entities. According to one highly respected commentator, "To say that people may incorporate for any purposes save religious ones is a classification which cannot measure up to the standards of the First Amendment." 1 A.E. Dick Howard, Com-mentaries on the Constitution of Virginia 546 (1974).

3. Churches and the Courts

NOTES

1. *Board of Extension v. Eads*, 159 W.Va. 943, 230 S.E.2d 911 (W.Va. 1976). This case involved a dispute between a national organ of the Church of God and a local congregation over title to realty. The power of courts to adjudicate intrachurch disputes is severely limited by the First Amendment to the U.S. Constitution and Article III, § 15 of the W. Va. Constitution. Such judicial involvement would threaten the principles of separation of church and state by inviting unacceptable governmental interference with the governance of religious institutions and the articulation of religious doctrine.

Courts have developed criteria to guide them in determining when they must decline jurisdiction in order to preserve the separation of church and state. Justice Neely described those criteria in *Eads*:

> . . . The separation of church and state dictates two distinct approaches to church litigation depending upon whether a given church conforms to a hierarchical church structure where the local churches are connected with and subordinate to the laws, procedures and organs established by the constitution and bylaws of the general church or, alternatively, whether the church is congregational in nature with authority vested in local congregations. *Brady v. Reiner*, 157 W.Va. 10, 198 S.E.2d 812 (1973). The difference in approach is predicated in part on the fact that hierarchical churches have a legal tradition and a system of canon law for conflict resolution within the church . . .. Therefore it is not unreasonable that, with regard to disputes within hierarchical churches, civil courts should respect, and where appropriate enforce, the final adjudications of the highest church tribunals, provided that such adjudications are not procured by fraud or collusion.
>
> The problems of church litigation become more complicated in churches with congregational structures because the civil courts are unable to rely upon the integrity of a well developed and time tested system of canon law. [I]ntervention in church controversies is a sticky wicket at best; however, . . . history also teaches that church controversies, where left unresolved, will ultimately lead to civil strife, riots, and violence. In disputes within churches, civil courts at some point must make an adjudication of rights without the assistance of a respected system of conflict resolution within the church.
>
> . . . Therefore, unless a court can apply a completely neutral principle of law unsusceptible to the result-oriented rule selection process, a civil court must stay its hand, decline to intervene, and leave the matter in whatever status quo the machinations of the church itself have brought it.

In this case, the court found the Church of God had a congregational structure, which gave autonomy in church affairs, including doctrine, to the local churches. There was no evidence of a system of interconnected constitutions and bylaws that would establish a hierarchical church structure with a generally recognized internal system of conflict resolution. In addition, the dispute at hand turned on construction of an unambiguous "reverter clause" in the relevant deed. Thus, the Court concluded the trial court should have asserted jurisdiction and awarded the property to the entity named in the reverter clause, i.e., the national organization.

2. *Church of God of Madison v. Noel*, 173 W.Va. 589, 318 S.E.2d 920 (W.Va. 1984). In another property dispute between a local church and its national association, the Court this time found an hierarchical structure prevailed between the parties. "With regard to disputes within hierarchical churches, civil courts should respect, and where appropriate enforce, the final adjudications of the highest church tribunals, provided that such adjudications are not procured by fraud or collusion." Here the plaintiffs had been "removed and replaced as trustees of the local church and their successors obtained a [deed to the property] in conformity with the directives of the general church. Because the proper church authorities had already determined who were the proper trustees of the Church of God of Madison, the civil courts were bound to abide by that decision." *Accord, Original Glorious Church of God v. Myers*, 367 S.E.2d 30 (W.Va. 1988).

Justice Miller dissented, arguing that the U.S. Supreme Court decision in Jones v. Wolf, 443 U.S. 595 (1979), allowed states greater flexibility in resolving church disputes than had previously been the case. After Jones, said Miller, "the states are free to use any method of resolving church property disputes which does not require courts to decide questions of religious doctrine or polity." Thus, the court in this case could have -- and should have -- proceeded to determine who was entitled to the property under traditional principles of property law.

3. *Gillespie v. Elkins Southern Baptist Church*, 177 W.Va. 89, 350 S.E.2d 715 (W.Va. 1986). A minister fired by vote of the congregation sued the church for wrongful discharge. In an opinion by Justice McGraw, the Supreme Court of Appeals reversed the jury verdict for the minister. Almost inevitably, the Court reasoned, such a claim entails an examination of the reasons for the pastor's discharge and thus "would require the courts to go beyond completely neutral principles of law to inquire into church doctrine or to determine if the termination was arbitrary." Therefore, "[w]ithout some compelling reason to do otherwise, this Court will limit its analysis to inquiring whether the congregation met and whether it acted to terminate the pastor's services."

C. Unenumerated Rights

1. The "Glittering Generalities"

Read Article III, §§ 1-3.

WOODRUFF V. BOARD OF TRUSTEES, 173 W.Va. 604, 319 S.E.2d 372 (1984).

McGRAW, Justice:

The petitioners in this original proceeding in mandamus are fourteen former employees of Cabell Huntington Hospital, and their union district president, Tom Woodruff. The respondents are the Board of Trustees of Cabell Huntington Hospital; its acting president, Stephen E. Shride; and its vice-president, Walter M. Jacob.

The petitioner employees seek reinstatement after they were discharged for distributing leaflets on and near the hospital premises. This request for extraordinary relief is based upon the petitioner employees' contention that their activities were protected exercises of free speech rights guaranteed under the state and federal constitutions.

On April 16, 1984, the respondent Board of Trustees announced its decision to eliminate forty-three positions at the hospital. The union representing a substantial number of the employees at the hospital, including thirty-nine of those whose positions were to be eliminated, publicly disputed the necessity of the proposed job eliminations. The union, and its members, utilized various public forums for the expression of their views on this issue. The respondents state that any

retaliatory action taken against the petitioners was not in response to these activities. On May 9-13, 1984, however, the petitioners participated in the group distribution of leaflets on and near the hospital premises. The respondents state that the petitioners were discharged for participating in this group distribution. Although the respondents complain that negative comments concerning hospital management were made by those participating in this group distribution of leaflets; that some nonunion personnel felt inconvenienced by the petitioners' activity; and that there was some littering in connection with the distribution of leaflets, there is no indication that this distribution was anything but peaceful. Additionally, there is nothing in the record, beyond the respondents' bald allegations to the contrary, which indicates that the normal operations of the hospital were, in any way, adversely affected by the group distribution of leaflets.

Nevertheless, on May 11, 1984, respondent Jacob issued a memorandum to the union which characterized the group distribution of leaflets on and near the hospital premises as a violation of a collective bargaining agreement provision which prohibited "picketing or patrolling." On May 12, 1984, nine hospital employees, with a total of eighty-four years' experience at the hospital, were terminated for the distribution of leaflets. On May 14, 1984, five other hospital employees, with a total of forty-six years' experience at the hospital, were also terminated for the continued distribution of leaflets. Among the petitioners discharged were all of the local union officials and every hospital employee who was a union district official. The respondents contend, however, that no attempt was made to single out union officers for discipline.

. . . The primary issue presented in this action is whether the disciplinary actions taken by the hospital in response to the group distribution of leaflets by the fourteen hospital employees violated their free speech rights under the federal and state constitutions. . . .

II.

The Cabell Huntington Hospital is a public institution, created by an act of the Legislature in 1945. . . . As a public institution, it is subject to the limitations imposed by free speech rights guaranteed its employees under the federal and state constitutions.

Article XXV, § 1 of the collective bargaining agreement between the union and the hospital provides, in pertinent part, that:

> neither the Union nor the employees or any of them will instigate, cause, encourage, promote, sponsor, lend aid to, sanction, engage in or condone any strike, slowdown in any facility of the Hospital or any curtailment of work or restriction of production of the Hospital or any picketing or patrolling during the term of this agreement.

Section 4 of article XXV further provides that "The Hospital shall have the right to ... discharge any employee who violates Section 1 of this Article." The termination actions taken by the hospital were made pursuant to these two contract provisions.

The United States Supreme Court has long held that public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [institutions] in which they work." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). . . . [I]n Gooden v. Board of Appeals of the West Virginia Department of Public Safety, 160 W.Va. 318, 324, 234 S.E.2d 893, 897 (1977), this Court stated that:

> public employees are entitled to the protections afforded by the First and Fourteenth Amendments and any regulations pertaining to such employees must strike a balance between the interests of such employee, as a citizen commenting on matters of public concern, and the interest of the state in promoting efficiency in its affairs.

Unquestionably, the distribution of leaflets is an activity protected under constitutional free speech guarantees. . . . Similarly, the group distribution of leaflets is an activity protected under constitutional free speech guarantees. Article III, § 16 of the West Virginia Constitution provides that "The right of people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." The

protections inherent and explicit in this state constitutional provision parallel associational, assemblage, and petition protections found under the first amendment. Under the federal constitution, the United States Supreme Court has consistently held that as long as an assemblage for expressive activity is peaceful, and no violence is advocated, it is protected under the first amendment. Furthermore, when expressive activity is directed toward a public employer by public employees, the right to petition government for a redress of grievances is implicated. This right, as we stated in Webb v. Fury, 282 S.E.2d 28, 34 . . . is "'among the most precious of the liberties safeguarded by the Bill of Rights.'["] . . .

Because the collective bargaining agreement in question contains a provision prohibiting picketing and patrolling by hospital union members, the issue of waiver of free speech rights is raised. First, waiver of free speech, assembly, association, and petition rights under the West Virginia Constitution will be addressed. Second, waiver of first amendment rights under the federal constitution will be examined. Article III, § 1 of the West Virginia Constitution provides that:

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

These inherent rights, of which members of society may not by contract divest themselves, include the freedoms of speech and press under article III, § 7 of the West Virginia Constitution, and the rights to assemble, associate, and petition under article III, § 16 of the West Virginia Constitution. No parallel provision to this section of our state constitution appears in the United States Constitution. Therefore, with respect to the waiver of fundamental constitutional rights, our state constitution is more stringent in its limitation on waiver than is the federal constitution. We therefore hold that, under article III, §§ 1, 7, and 16 of the West Virginia Constitution, collective bargaining agreements in the public sector may not contain provisions abrogating employees' fundamental constitutional rights, including rights of expression, assembly, association, and petition. The petitioner employees' activities in the present case were unquestionably exercises of all four of these fundamental constitutional rights. We therefore conclude that the respondents' termination of the petitioner employees violated their fundamental constitutional rights under article III, §§ 1, 7, and 16 of the West Virginia Constitution.

III.

In addition to the violation of the petitioner employees' fundamental constitutional rights under the state constitution, we also conclude that their termination violated their first amendment rights under the federal constitution. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the United States Supreme Court set forth an approach for evaluating claims of waiver of free speech rights. . . . [T]he Court stated, "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." . . .

The collective bargaining agreement prohibited "picketing or patrolling," which are not defined anywhere in the agreement. The terms "leafletting" or "handbilling" do not appear in the agreement.[4] The section of the collective bargaining agreement with which we are dealing is basically a "no strike" clause, and is designated as such in the agreement. Its prohibitions against picketing or patrolling are in reference to other activities associated with a strike or a slowdown. There is no allegation that any of the petitioners, or the leaflets they distributed, attempted to

[4]We must emphasize at this point that even if these terms had been included in the collective bargaining agreement, the hospital would still have to show a substantial relationship to a compelling state interest under article III, §§ 1, 7, and 16 of the West Virginia Constitution in order to sustain their constitutionality. We merely note their absence in the context of our discussion of the federal constitutional issue in order to illustrate the uncertain applicability of the provision in question to the activities engaged in by the petitioners.

discourage anyone from doing business with the hospital. . . .

The petitioners' group distribution of leaflets was not clearly in violation of the terms of the collective bargaining agreement. Furthermore, the uncertainty as to the meaning of the terms "picketing" and "patrolling" within the context of this collective bargaining agreement provision falls well short of the "clear and compelling" test ... so as to constitute a waiver of the petitioners' right to distribute leaflets.

We therefore hold that, under the First Amendment to the United States Constitution and under article III, §§ 1, 7, and 16 of the West Virginia Constitution, the respondents' termination of the petitioner employees violated their fundamental constitutional free speech rights. Accordingly, we order the petitioner employees' reinstatement with back pay from the date of their individual discharges. . . .

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, INC. V. PANEPINTO, 191 W.Va. 436, 446 S.E.2d 658 (1993).

WORKMAN, Chief Justice:

Appellants challenge the August 25, 1993, order of the Circuit Court of Kanawha County upholding the constitutionality of West Virginia Code § 9-2-11 which bans the use of state medicaid funds for abortions except in limited circumstances. Those individuals and organizations, to whom we collectively refer as Appellants, claim that to deny those abortions which are determined to be "medically necessary,"[4] violates the West Virginia Constitution. After extensive consideration . . ., we conclude that West Virginia Code § 9-2-11 constitutes a discriminatory funding scheme which violates an indigent woman's constitutional rights.

Senate Bill 2, in essence a medicaid tax reform bill, was introduced and passed by the Legislature during a second special session in May 1993. Also contained within the provisions of Senate Bill 2 was the text of West Virginia Code § 9-2-11. . . . On July 9, 1993, the Women's Health Center of West Virginia, Inc., Women's Health Services, Inc., and West Virginia Free, on behalf of themselves and all medicaid-eligible women in West Virginia filed a complaint in the Circuit Court of Kanawha County, seeking to have that portion of Senate Bill 2, which became West Virginia Code § 9-2-11, declared unconstitutional. Following a trial on this matter on August 11 and 12, the circuit court entered its ruling on August 25, 1993, declaring the challenged portion of Senate Bill 2 constitutional. . . .

Contrary to Appellees' representation, the question before this Court is not whether the state is obligated to subsidize the exercise of a woman's right to have an abortion. Rather, the issue presented is whether, once the state undertakes funding of medical care for the poor, which includes funding for childbirth, can the state deny funding for medically necessary abortion services? More specifically, does the limitation of funds to certain legislatively-specified reproductive services violate the constitutional protections afforded the indigent female citizens of this state?

We begin our analysis by addressing Appellees' contention that the decision of the United States Supreme Court in Harris v. McRae, 448 U.S. 297 (1980), which upheld the funding restrictions imposed by the Hyde Amendment, should control the outcome of this case. At issue in Harris, was

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[4]Under federal law and regulations, all medical services must be "medically necessary." See 42 U.S.C.A. ss 1396, 1396a(a)(10)(A), 1396d(a) (West 1992 & Supp.1993). For determining whether a submitted medical expense qualifies as medically necessary, the West Virginia Department of Health and Human Services has adopted Policy No. MA-85-4, which provides that the Department: "makes reimbursement for pregnancy termination when it is determined to be medically advisable by the attending physician in light of physical, emotional, psychological, familial, or age factors (or a combination thereof) relevant to the well-being of the patient."

whether the denial of public funding via the Medicaid program for certain medically necessary abortions violated the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment or either of the religion clauses of the First Amendment. 448 U.S. at 301. Recognizing that a woman's decision whether to terminate her pregnancy falls within the liberty protection of the Due Process Clause, the Court in Harris ruled that:

> it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason was explained in Maher [v. Roe, 432 U.S. 464 (1977)]: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.... [T]he fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in [Roe v.] Wade [410 U.S. 113 (1973)].

. . . The Court also rejected claims based on equal protection and religion. . . . Appellees suggest that we adopt the reasoning used in Harris and conclude that notwithstanding a woman's fundamental right to have an abortion, the state is not required to provide funding to enable the exercise of that right.

Conversely, Appellants maintain that this Court is not bound by the Harris decision under the rationale that because the West Virginia Constitution provides more expansive protections to its citizens than the federal constitution, this state's constitutional protections prevail. See Doe v. Maher, 40 Conn.Supp. 394, 419, 515 A.2d 134, 147 (1986) ("federal decisional law is not a lid on the protections guaranteed under our state constitution"). As support for this proposition, Appellants cite decisions in seven states which have relied on the greater protections of their respective state constitutions to find abortion-restrictive language in entitlement programs unconstitutional. . . .

Those protections unique to our state constitution as contrasted to the federal constitution are found in sections one, three, and ten of article III. Section one of article III reads:

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

W.Va. Const. art. III, § 1 (emphasis supplied). Nowhere in the United States Constitution are the terms "equally free and independent" or "safety" or comparable rights guaranteed. Similarly, section three of article III provides that: "Government is instituted for the common benefit, protection and security of the people, nation or community." W.Va. Const. art. III, § 3 (emphasis supplied). The federal constitution is devoid of any language stating that the federal government is instituted for the "common benefit" and "security" of its citizens. Although our due process clause does not significantly differ in terms of its language from the Fifth and Fourteenth Amendments to the federal constitution, this Court has determined repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart. See State v. Bonham, 173 W.Va. 416, 317 S.E.2d 501 (1984).

In Bonham, this Court noted that, "the United States Supreme Court has ... recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution." 173 W.Va. at 418, 317 S.E.2d at 503 (citing, inter alia, Connecticut v. Johnson, 460 U.S. 73, 81 n. 9, 103 S.Ct. 969, 974 n. 9, 74 L.Ed.2d 823 (1983)). Based on the principle that " '[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution [,]' Syllabus Point 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979)," we ruled in Bonham, that this state's due process clause affords a criminal defendant greater protections than the federal

counterpart. 173 W.Va. at 418-19, 317 S.E.2d at 503-04 and Syl. Pt. 1 (holding that imposition of more severe sentence following trial de novo does violate defendant's due process rights); see also West Virginia Citizens Action Group v. Daley, 174 W.Va. 299, 324 S.E.2d 713 (1984) (state constitution compels striking limitation on soliciting after sunset even if federal constitution does not); Woodruff v. Board of Trustees of Cabell Huntington Hospital, 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984) (Article III, § 1 "more stringent in its limitation on waiver [of fundamental rights] than is the federal constitution"); Pushinsky v. West Virginia Board of Law Examiners, 164 W.Va. 736, 266 S.E.2d 444 (1980) (recognizing that state constitution imposes more stringent limitations on power of state to inquire into lawful associations and speech than those imposed by federal constitution); Pauley v. Kelly, 162 W.Va. 672, 707, 255 S.E.2d 859, 878 (1979) (ruling that education is a "fundamental constitutional right"); see generally Justice Thomas B. Miller, The New Federalism in West Virginia, 90 W.Va.L.Rev. 51 (1987-88).

The provision of enhanced guarantees for "the enjoyment of life and liberty ... and safety" by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent. W.Va. Const. art. III, § 1. Accordingly, we are not bound by federal precedent in interpreting issues of constitutional law arising from these enhanced guarantees. See [Bonham]. Furthermore, because we are permitted to elevate our constitutional protections, we are similarly free to reject federal precedent such as Harris. [We] do just that today.

Under Roe v. Wade[,] the constitutional basis for granting a woman choice with regard to pregnancy termination is grounded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." [In] the most recent United States Supreme Court decision on the issue, the Court reiterated the central premise of Roe --that women may, for some time period, make independent decisions to obtain abortions based on the right to privacy. Planned Parenthood v. Casey, 505 U.S. 833, 860-61 (1992). Appellees claim, however, that West Virginia has not recognized a parallel fundamental right to privacy under our state constitution similar to that recognized in Roe. . . Because there is a federally-created right of privacy that we are required to enforce in a non-discriminatory manner, it is inconsequential that no prior decision of this Court expressly determines the existence of an analogous right.

Appellants note that if an indigent woman who is receiving Aid to Families with Dependent Children (AFDC) benefits, receives a gift or donation, earns additional income, or borrows funds to pay for an abortion, that money is required to be reported to the Department of Human Resources ("DHS") [*sic*] and may render the woman ineligible to receive continued benefits. As attested to by John A. Boles, Jr., the Director of the Office of Income Maintenance within the DHS, even a gift, donation, loan, or extra income in the amount of $333 "would, in most cases, disqualify the recipient for several months." Thus, indigent women who are forced to secure funds to pay for an abortion are, in effect, penalized for the exercise of a constitutional right. Moreover, the penalty is realized not only by the women, but also by their families through the loss of funds which would have been received if not for the exercise of a constitutional right.

Furthermore, Appellants point out that the provisions of West Virginia Code § 9-2-11 necessarily impinge on the health and safety of poor women. To illustrate how the denial of funding for medically necessary abortions impacts negatively on the safety of indigent women, Appellants identify those types of health concerns that may warrant an abortion which are not covered by West Virginia Code § 9-2-11. Specific examples of medical conditions which may necessitate performing an abortion are hypertension which places pregnant women at higher risk for strokes, premature placenta separation, and a severe bleeding disorder. Other medical conditions which may place the mother's health in jeopardy if she continues the pregnancy include gestational diabetes, epilepsy, and phlebitis. In certain instances, as in the case of phlebitis, the drugs used to prevent blood clotting in the lungs are dangerous to the fetus and cannot be administered if the woman is pregnant. In the case of malignant breast tumors, pregnancy may actually accelerate the growth of the tumors. According to the submitted record, many of these problems occur with greater frequency among

low-income women.

Given that the term safety, by definition, conveys protection from harm, it stands to reason that the denial of funding for abortions that are determined to be medically necessary both can and most likely will affect the health and safety of indigent women in this state. To deny this conclusion requires that we similarly deny the reality of being poor. The question then becomes whether this arguable impingement on safety resulting from the provisions of West Virginia Code § 9-2-11 rises to the level of impermissible state action.

The United States Supreme Court explained in Maher,

> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

432 U.S. at 469-70. The Court ruled in Maher that Connecticut regulations which excluded funding for nontherapeutic abortions did not violate the Equal Protection Clause of the Fourteenth Amendment. . . .

[T]he potential denial of AFDC benefits upon borrowing, earning, or receiving funds to pay for an abortion is yet another illustration of how indigent women are coerced by the State to have children which they might otherwise choose not to bear.

Appellees strenuously argue that the state is not obligated to pay for the exercise of constitutional rights. While this proposition is true as stated, it is equally true that once a government chooses to dispense funds, it must do so in a nondiscriminatory fashion, and it certainly cannot withdraw benefits for no reason other than that a woman chooses to avail herself of a federally-granted constitutional right. . . . As noted in Moe [v. Secretary of Admin. & fin., 382 Mass. 629, 417 N.E.2d 387 (1981)],

> the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.' . . .

The concept invoked by selective governmental funding is the issue of government neutrality. We have previously determined that the common benefit clause of article III, section 3 of the West Virginia Constitution imposes an "obligation upon state government ... to preserve its neutrality when it provides a vehicle" for the exercise of constitutional rights. United Mine Workers v. Parsons, 172 W.Va. 386, 398, 305 S.E.2d 343, 354 (1983). We characterized article III, section 3 as an "equal protection clause" that serves the goal of "fundamental fairness." Id. Under this rationale, we ruled that while there was no constitutional mandate to sell air time to anyone, once West Virginia University sold broadcast time to the coal industry for the presentation of "a politically controversial issue of public concern," the University was required to sell equal air time to the coal miners' union to permit contrasting viewpoints. Id. Furthermore, we noted in Parsons, that the obligation of the government to act for the "common benefit, protection, and security" of its citizens is "as applicable in the [arena of free speech] ... as it is in any other context." Id.

In reliance on Parsons, Appellants argue that strict neutrality is mandated whenever state government operates to assist constitutionally-protected decisions. In resolving this same issue of neutrality, the Massachusetts Supreme Court looked to the views Justice Brennan expressed in his dissent to Harris:

> 'In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally

> guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in Roe v. Wade.'

. . . Appellants urge this Court to accept the reasoning articulated by Justice Brennan and others that by denying funding for medically necessary abortions while funding childbirth, the state impermissibly pressures women towards a state-approved reproductive choice. The effect of such restrictions is inherently coercive where a woman is too poor to afford appropriate medical care:

> [F]rom a realistic perspective, we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights. On the contrary, the state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.

[Committee to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 276, 625 P.2d P.2d 779, 793, 172 Cal.Rptr. 866,880]. Appellants suggest and we agree that for an indigent woman, the state's offer of subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her federally-protected choice. Under the rationale announced by this Court in Parsons, we hold that when state government seeks to act "for the common benefit, protection and security of the people" in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens. . . .

While Appellees prefer to characterize this case as one involving guarantees of state funding to carry out a protected right, what is really at issue here is "the right of the individual ... [to be] free from undue government interference, not an assurance of government funding." . . . Given West Virginia's enhanced constitutional protections, we cannot but conclude that the provisions of West Virginia Code § 9-2-11 constitute undue government interference with the exercise of the federally-protected right to terminate a pregnancy. As we have discussed above, were it not for this state's undertaking to provide medically necessary care to the poor through entitlement programming such as medicaid, it would not be operating in violation of its obligation to act neutrally for the common benefit of its citizens by enacting legislation such as West Virginia Code § 9-2-11, the effect of which is forced compliance with legislated reproductive policy.

Having concluded that the provisions of West Virginia are unconstitutional, all that remains is to fashion a remedy. . . . [W]e conclude that that portion of Senate Bill 2 which is West Virginia Code § 9-2-11 is severable from the remainder of Senate Bill 2 under the general severability clause applicable to all statutes, West Virginia Code § 2-2-10(cc) (1990), because there is no provision in any section of chapter nine of the Code which prohibits severability and because the remaining parts of Senate Bill 2 are complete and capable of standing alone.

Based on the foregoing, we hereby reverse and remand the decision of the Circuit Court of Kanawha County for entry of an order reflecting the rulings herein. ...

[A dissenting opinion by Justice McHugh and joined by Chief Justice Brotherton is omitted.]

NOTE ON ARTICLE VI, § 57

A 2018 Amendment to the Constitution overruled the specific holdings in *Panepinto* by adding Article VI, § 57 to the Constitution. That section provides, “Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.”

NOTES: ARTICLE III, § 3

[From ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 59-61 (2nd ed., Oxford University Press, 2016).]

Application of Article III, § 3 by the West Virginia Supreme Court of Appeals has largely focused on enforcing political rights. Prior to 1977, only one decision had referred to § 3, and then it was only to cite it as justification for the exercise of the police power in promoting the general welfare. Mapel v. John (1896). After 1977, however, the Court invoked § 3 on several occasions, often imposing limits on the political branches. On the other hand, most, if not all, of those decisions could have relied, or did rely, on other, more specific constitutional provisions. The modern cases include the following significant holdings.[1]

(1) *Cowan v. County Comm. of Logan* (1977) invalidated a statute that required those signing a municipal incorporation petition to be freeholders; "valuable political rights" are reserved for a majority of the community, not merely to freeholders.[2]

(2) *Pushinsky v. Board of Law Examiners* (1980) found the Board had acted unconstitutionally when it denied admission to the Bar of a qualified candidate because he had refused to answer questions about whether he advocated, or belonged to an organization that advocated, forceful overthrow of the government. The Court's discussion and rationale rested primarily on federal First Amendment authorities, but added that § 3's "right of the majority to 'reform, alter, or abolish' an inadequate government . . . offers limitations on the power of the state to inquire into lawful associations and speech more stringent than those imposed" by the federal First Amendment.[3] The Court did not elaborate. Similarly, West Virginia Citizens Action Group v. Daley (1984) relied upon federal authorities to decide a rather straightforward issue of free speech and commented, again without elaboration, that § 3 and other provisions under the State Constitution granted greater protection to canvassing activities than did the First Amendment. Both Pushinsky and WVCAG are reproduced in Section B, above.

(3) *Webb v. Fury* (1981) concerned the right to petition the government for redress of grievances, which is specifically protected by the federal First Amendment and by Article III, § 16 of the West Virginia Constitution. The case sought a writ of prohibition to halt a libel suit that had been filed by a strip mining company against an environmentalist based primarily on statements he had made about the company in complaints filed with state and federal regulatory authorities. Again relying for the most part on federally developed constitutional doctrines, the Court granted the writ.[4] But again the Court also found § 3 relevant. That section "'is reluctantly but commonly held by political scientists and constitutional lawyers as a reservation of the right of revolution under certain circumstances to the sovereign people.' . . . Thus, while the United States Constitution guarantees to the people the right to petition all branches of government, the West Virginia Constitution also gives the people the right to 'reform, alter or abolish' it."[5]

(4) *United Mine Workers of America v. Parsons* (1983) also concerned a free speech issue. The suit resulted from a series of advertisements sponsored by the state Coal Association on Mountaineer

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[1]The cases prior to 1987 are analyzed and discussed in detail in Note, *The "Right of Revolution": The Development of the People's Right to Reform Government*, 90 W. VA. L. REV. 283 (1987).

[2]Cowan v. County Comm. of Logan, 161 W. Va. 106, 117 n.6, 240 S.E.2d 675, 681 n.6 (1977).

[3]Pushinsky v. Board of Law Examiners, 164 W. Va. 736, 744-45, 266 S.E.2d 444, 449 (1980).

[4]But see Harris v. Adkins (1993) and the discussion below of Article III, § 16.

[5]Webb v. Fury, 167 W. Va. 434, 448 n.4, 282 S.E.2d 28, 37 n.4 (1981) (quoting Shobe v. Latimer, 162 W. Va. 779, 790 n.7, 253 S.E.2d 54, 61 n.7 (1979)).

Sports Network (MSN) broadcasts of West Virginia University sporting events. The ads espoused the Association's views on various environmental, tax, employment, and other regulatory issues in the State. The Union requested time to respond with its own ads on MSN broadcasts. The Network refused the request because it allotted the spots on a first-come-first-served basis, and sponsors who came first were allowed to buy as many ads as they wanted and were given priority from one year to the next. The effects of the policy were that there were no slots available for the Union and there would not be any in the foreseeable future.

The Union sued to force MSN to afford the Union or other responsible parties an opportunity to respond to the Coal Association on MSN broadcasts. The Supreme Court of Appeals granted relief prospectively. After reviewing United States Supreme Court decisions, the Court first concluded that MSN operated in a public forum and then analogized the obligation of a broadcaster under the Federal Communications Act of 1934, 47 U.S.C. §§ 151, et seq., to operate in the "public interest" to the obligation imposed upon state government by Article III, § 3 to act "for the common benefit and security of the people." That provision, the Court said, is an equal protection clause that promoted the principle of government neutrality in the field of ideas and served objectives not covered by the Communications Act:

> One of these objectives is fundamental fairness, a concept which is inherent in equal protection. Accordingly, we conclude that when a state agency or instrumentality sells advertising for broadcast which presents one side of a politically controversial issue of public concern, it is obligated under W. Va. Const. art. III, § 3 and art. III, § 7 to preserve its neutrality by providing a reasonable opportunity for the presentation of contrasting points of view in order that the "common benefit, protection and security" be served and fundamental fairness preserved.[6]

(5) The Court extended the Parsons reasoning to the context of medicaid funding for abortion in *Women's Health Center v. Panepinto* (1993), which is reproduced immediately preceding these Notes.

From these disparate contexts, figuring where the Court has taken § 3 is not easy. Nor is it at all clear that other, more specific constitutional provisions, especially those protecting the freedoms of expression, supported by existing and established doctrines, would not have produced the very same results. Moreover, the Court's references to § 3 as the "right of revolution," implying some vesting of rights to use force, is surely misleading. After all, § 3 gives the right to "reform, alter or abolish" the government to "a majority of the community." Thus, so long as democratic processes remain in place--as is required by the Federal and State Constitutions--then the majority can use them to peacefully effect change. West Virginia did just that, of course, when it called for a constitutional convention and then ratified the 1872 Constitution. Frequent amendments further attest to the majority's right in this regard.

Despite these difficulties, certain principles do emerge from the cases. They emphasize the rights to self-determination, to participate meaningfully and equally in the political processes and public exchange, and to invoke all lawful means to bring about reform. In addition, § 3 imposes on government an obligation of neutrality whenever it affirmatively provides for the exercise of constitutional rights by its citizens. The applications of § 3 reflect a broad, ideological vision of republican democracy, and that was the basis for its inclusion in both Virginia's Declaration of Rights and West Virginia's Constitution. The Court's invocation of that heritage thus serves an important hortatory function, urging citizens to participate in the political life of the State, and instructs those who seek change as well as those who impede it.

NOTE: A RIGHT TO SUBSISTENCE?

[6]United Mine Workers of America v. Parsons, 172 W. Va. 386, 398, 305 S.E.2d 343, 354 (1983).

In *State of West Virginia ex rel. K. M. v. West Virginia Department of Health and Human Resources,* 212 W.Va. 783, 575 S.E.2d 393 (2002), the Court entertained a challenge to the State's 1996 effort at welfare reform. Prior to that time, families without means of support could, upon meeting certain conditions, qualify for cash transfer payments on an indefinite basis under Aid to Families with Dependent Children. That program, however, was superseded by Temporary Assistance for Needy Families, or TANF, which capped a family's eligibility for welfare at 60 months, subject only to a very restrictive six-month extension. The petitioners focused their constitutional challenge on that 60 month cap.

Responding to the challenge, the Court eschewed reliance on the "happiness and safety" language in Article III, § 1 and instead reached into Article IX (the Local Government Article) and grabbed the language in its § 2 providing that "overseers of the poor . . . shall be appointed by the county [commission]." Writing for the Court, Justice McGraw ventured that the provision "seems to presume that such an office exists, and that each county would naturally have such officers." He pointed to a case decided shortly after the Constitution's adoption in which the Court held that a county, not a town, was responsible for paying for a doctor's services provided to an indigent. *Wells v. Town of Mason*, 23 W.Va. 456 (1884), had stated that "the duty of furnishing the necessary aid and assistance to a pauper living in the town of Mason was imposed on the overseers of the poor of Mason county, and the support of such pauper is a charge on the county of Mason and not on the town of Mason." McGraw also observed that the code in effect between the 1863 and 1872 Constitutions required overseers of the poor to "assist any person who is unable to maintain himself or his family as his or their necessities may require." That suggested the framers' awareness of "the longstanding existence of overseers of the poor in both pre- and post-revolutionary Virginia . . . [and] of the long history of State care for the poor from as long ago as seventeenth-century England and up to the formation of West Virginia. It is reasonable to presume that our State's founders simply continued the long-standing Virginia policy and practice of employing overseers of the poor to provide subsistence for the needy." McGraw also noted that "many of the drafters of our Constitution and many of our State's early leaders were deeply religious men who came from and lived in a less secular culture shaped by traditional Christian principles of charity and concern for the poor."

The 1930's and the "New Deal," however, shifted responsibility for caring for the poor from county governments to the state and national governments. By displacing the overseers of the poor and taking over welfare, the Legislature thereby apparently assumed the constitutional duties previously executed by the overseers. All of this led to these conclusions:

> Thus, in consideration of both history and our place in the governmental scheme, we hold that, by expressly including the office of Overseers of the Poor in Art. IX, § 2 of the West Virginia Constitution, the framers gave voice to the principle that government has a moral and legal responsibility to provide for the poor. The allocation of this responsibility rests with the Legislature, provided that the support granted is not constitutionally insufficient.
>
> We believe it should go without saying that the public has a vital interest in seeing that the poor are not destitute. We remark again that the great majority of those we refer to as "poor" are children, who did not pick their parents or their circumstances. The TANF program by its very name, Temporary Assistance to Needy Families, reinforces this idea.
>
> What happens to these children is of interest to every citizen of this State and every officer of government, even though the poor have little in the way of a lobby. These children can be our future voters, workers, and decision makers, or if ignored, our future drug addicts, inmates, and homeless. We can pay a little to help support them while they are young, or pay a lot to prosecute, defend, and incarcerate many of them when they are older. Even those who may not be moved by notions of charity should be moved by enlightened self-interest, as the problems faced by, and presented by, the poor cannot simply be wished away.

Thus, "[h]aving concluded that our Constitution does demand some degree of assistance for the

poor and needy," the Court turned to whether "the termination of cash assistance payments after five years violates this constitutional precept." Noting that the State continued to provide (among other things) housing assistance, medical benefits, food stamps, clothing assistance, transportation assistance, and free education and training, the Court concluded that the State was meeting its constitutional obligation and could, as a general proposition, reasonably limit cash transfers to a five year maximum. The opinion did not preclude, as emphasized by Justice Starcher's concurring opinion, "more narrowly drawn claims, even claims possibly seeking limited cash assistance, where other support systems are simply inadequate to achieve a minimal level of subsistence." Starcher also opined that the State's obligations as "the ultimate guarantor of a minimal level of subsistence to all of its citizens" extends to "basic medical care, as well as shelter, food, and education."

Justice Maynard dissented from that portion of the Court's opinion holding that "government has a moral and legal responsibility to provide for the poor." According to Justice Maynard, the Court did "not have the authority to impose a moral or legal responsibility on government in the absence of a clear expression in the Constitution or in any statutory law that such a responsibility exists." He did not believe that the "single, isolated reference to 'overseers of the poor' found in Art. IX, § 2" provided that "clear expression."

The Court was unanimous in striking down procedural deficiencies in determinations about entitlements to a six-month extension.

2. Procedural Due Process

Read Article III, § 10.

MAJOR v. DeFRENCH,
169 W.Va. 241, 286 S.E.2d 688 (1982).

McGRAW, Justice:

The appellant, Martha Major, appeals from a decision of the Circuit Court of Monongalia County which found that she was lawfully terminated from her position as a police officer for the City of Morgantown at the end of her probationary period, and was therefore not entitled to a written notice of the reasons for termination of her employment, or a hearing in which she could contest her dismissal. . . .

The appellant first applied for employment as a Morgantown police officer on January 17, 1977; she took the written civil service examination on February 2, 1977. Two weeks later, the city notified her that she had passed the exam with the second highest score. In compliance with department rules and statutes, the appellant took a physical examination and was personally interviewed by the all-male Morgantown Civil Service Commission. During the month of June 1977, two males were hired as Morgantown police officers. The City of Morgantown has never hired a female police officer.

The appellant filed a gender-based complaint with the Civil Rights Division of the U.S. Treasury's Revenue Sharing Funds Department. In early January, 1978, the appellant and the City of Morgantown were informed by the Treasury Department of its determination that the city had refused to hire petitioner on the basis of sex and that she was entitled to immediate hiring and back pay from June 31, 1977. The city insisted that the back pay date be amended to August 11, 1977, the date the appellant's name was removed from the list of eligibles. . . .

On February 8, 1978, appellee DeFrench wrote a letter to appellee Bennie F. Palmer instructing him to hire the appellant. On February 16, 1978, the appellant began work as a police officer for the City of Morgantown. On April 18, 1978, the Morgantown City Council authorized back pay from August 11, 1977 through February 15, 1978 in the amount of $2,934.26.

The appellant continued to work for the city from February 16, 1978 until November 15, 1978. She received a letter dated November 14, 1978 terminating her employment with the city because her performance as a probationary officer, in the words of the city, was not "acceptable." She requested and received a hearing before the Police Civil Service Commission on December 15, 1978. At the hearing, the appellant moved that she be reinstated because the city had failed to give her notice of specific charges for her termination. The commission agreed and ordered her reinstated with back pay.

That evening, she received a letter dated December 15, 1978 advising her that she was once again terminated. This time, DeFrench and Palmer listed eight reasons for her termination, including poor uniform discipline; criticizing fellow officers and members of the Sheriff's Department; disregarding orders; assisting persons arrested; and falsification of Federal Aviation Regulation 121.585.

The appellant again requested and received a hearing before the Police Civil Service Commission, held on January 12, 1979 and January 23, 1979. On February 9, 1979, the commission determined that the city had not proved the charges and again ordered the appellant reinstated with full back pay. On February 9, 1979, the appellant, at the request of her attorney, contacted DeFrench about her return to work. DeFrench informed her that he had told Palmer not to rehire her because the city was not satisfied with the commission's decision.

The appellant then received another letter on February 15, 1979, informing her that she was terminated at the end of her probationary period. No further action was taken on this letter, because on February 18, 1979, the appellant filed a writ of mandamus in the Circuit Court of Monongalia County requesting immediate reinstatement with back pay.

On March 26, 1979, pursuant to an oral order of Judge DePond, Martha Major returned to work as a police officer for the City of Morgantown. By order dated March 30, 1979, the court ruled that the city's refusal to reinstate the appellant on February 9 was illegal, and that she was entitled to reinstatement and back pay from December 15, 1978.

Appellant received yet another letter, dated March 30, 1979, advising her that her employment was being terminated at the end of her probationary period, effective March 31, 1979.[17] On April 13, 1979, the appellant instituted a civil action against the City of Morgantown and its officials for wrongfully terminating her employment as a police officer. In her complaint she alleged that the action of city officials terminating her employment was arbitrary, discriminatory, unlawful and a violation of due process. The appellant sought both injunctive relief and damages. The appellees answered, contending the appellant was lawfully dismissed pursuant to W.Va.Code § 8-14-11[,] and denied liability. The Circuit Court of Monongalia County, after a non-jury trial, entered judgment against the appellant and in favor of the appellees. The appellant appeals from that decision.

The primary issue presented by this appeal is whether the appellant is entitled to a written statement of the reasons for her dismissal, and the opportunity for a hearing at which her dismissal can be contested. The appellees contend such procedures are not required in this case because the appellant was dismissed at the end of her one year probationary appointment, and neither the constitution nor the applicable statutes require a hearing prior to dismissal of probationary employees. The appellant disputes the appellees' contention that her employment was terminated at the close of her probationary period, and argues that in any event, due process requires that she be afforded the opportunity for a hearing.

I.

[17]Apparently the city is of the opinion that the work performed by the appellant from March 26, 1979 to March 30, 1979 should be substituted for the period of February 9, 1979, the date the appellees refused to rehire the appellant, to February 15, 1979, the date her probationary term should have ended. Therefore the letter of March 30, 1979 was merely a reiteration of the dismissal attempted on February 15, 1979.

The appellees contend the appellant was lawfully dismissed pursuant to the provisions of W.Va.Code § 8-14-11, which provides, in pertinent part:

> All original appointments to any positions in a paid police department subject to the civil service provisions of this article shall be for a probationary period of one year: Provided, that at any time during the probationary period the probationer may be discharged for just cause, in the manner provided in section twenty [§ 8-14-20] of this article. If, at the close of this probationary term, the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified, in writing, that he will not receive absolute appointment, whereupon his employment shall cease; otherwise, his retention in the service shall be equivalent to his final appointment.

They argue that the appellant's employment commenced February 16, 1978, and that she was dismissed February 15, 1979 at the end of her probationary period, and therefore no specification of reasons for dismissal, nor a hearing concerning those reasons, is necessary. . . .

The appellant[,] contends that she was not dismissed at the end of the one year probationary period. She argues that her probationary period should be deemed to commence on August 11, 1977, the beginning date of her back pay award. . . . [We] reject [that argument]. Rather we hold that the probationary period of employment mentioned in W.Va.Code § 8-14-11 commences when the probationer actually begins work. Accordingly, the appellant's probationary period of employment began February 16, 1978, the date she was sworn in and assumed the duties of police officer for the City of Morgantown.

In the usual case the probationary period will expire one year from the date it commences. However, in order to fulfill the purposes for which the probationary period was designed, it is necessary for the probationer to engage in actual service for the full probationary term. . . . Consequently, where the probationer is prevented from serving the full probationary period by forces beyond his or her control, the probationary period must be extended to provide the probationer, as well as the employer, the full benefit of the probationary period. . . .

In this case the appellant began work as a Morgantown police officer on February 16, 1978. . . . [O]n February 15, 1979, the date her probationary period would normally have expired, . . . the appellant had only worked for a period of nine months; her one year probationary period had not yet expired, and consequently she was entitled to the procedural protections of W.Va.Code §§ 8-14-11 and 8-14-20. Thus the finding of the circuit court that the appellant was lawfully dismissed at the end of her probationary period without reason being given and without the opportunity for a hearing, is erroneous. ...

II.

. . . [E]ven if the appellant had been dismissed at the end of her probationary period, we believe she still would have been entitled to procedural protections designed to insure the rationality of the decision regarding her continued employment. This result is dictated by the due process clauses of the United States and West Virginia Constitutions.

The United States and West Virginia Constitutions guarantee that no person shall be deprived of life, liberty or property without due process of law. W.Va.Const. art. 3, § 10; U.S.Const. amend. XIV. It is fundamental to say that due process guarantees freedom from arbitrary treatment by the state. Thus whenever government action infringes upon a person's interest in life, liberty or property, due process requires the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards. . . . Because we find that a police civil service employee who has completed a one year term of probationary employment has both a "property" and a "liberty" interest in continued employment, the state must afford the employee due process protection before employment can be terminated.

PROPERTY INTEREST

A "property" interest protected by due process must derive from private contract or state law, and must be more than a unilateral expectation of continued employment. Board of Regents v. Roth,

408 U.S. 564 (1972); State ex rel. McLendon v. Morton, W.Va., 249 S.E.2d 919 (1978); Waite v. Civil Service Comm'n, W.Va., 241 S.E.2d 164 (1977).

The property interest of a civil service employee who has completed the probationary period of employment flows from the provisions of W.Va.Code § 8-14-11. The pertinent portions of the statute specify that "[i]f at the close of [the one year] probationary term, the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified, in writing, that he will not receive absolute appointment, whereupon his employment shall cease ...." (Emphasis added.)

We agree with the appellant's contention that the statute requires, by its reference to "conduct and capacity," that the decision on the continued employment of a probationer is to be based on the employee's job performance and abilities, and creates in the employee a reasonable expectancy that if she has satisfied all the eligibility requirements and has performed well on the job, her employment will be continued.

This situation is directly analogous to that in State ex rel. McLendon v. Morton, supra. In McLendon this Court held that "[a] teacher who has satisfied the objective eligibility standards for tenure adopted by a State college has a sufficient entitlement so that he cannot be denied tenure on the issue of his competency without some procedural due process." Syllabus Point 3, State ex rel. McLendon v. Morton, supra.

The "objective eligibility requirements" of McLendon were found in the college's regulations and a Board of Regents Policy Bulletin. These requirements provided that all employees who held the rank of Assistant Professor or above could apply for tenure at the end of a six-year probationary period, and that their applications would be evaluated by the appropriate committee.

On the basis of these regulations we concluded:

> . . . [S]atisfying the objective eligibility standards for tenure gave Professor McLendon a sufficient entitlement so that she could not be denied tenure on the issue of her competency without some procedural due process. 249 S.E.2d at 925.

The eligibility criteria which a police civil service employee must satisfy for consideration as a permanent employee are contained in the applicable civil service statutes. They include a formal application, W.Va.Code 8-14-12; the completion of a competitive and medical examination, [§] 8-14-11; appointment, [§] 8-14-15; and service for a one year probationary term; [§] 8-14-11. As we noted in McLendon, supra, satisfaction of these eligibility requirements does not mean that the employee is automatically entitled to permanent status. However satisfaction of the eligibility criteria does provide the employee with a sufficient interest that she cannot be denied permanent status on the issue of her conduct and capacity without some procedural due process.

That the constitution requires such a result is implicit in our decision in Airhart v. Carpenter, W.Va. 260 S.E.2d 729 (1979). There we recognized that a civil service employee cannot be dismissed at the conclusion of his probationary term without some procedural protection indicating the reasons for his dismissal. In Airhart a probationary deputy sheriff was advised by the sheriff at the conclusion of his six month probationary period, that his conduct and capacity had not been satisfactory and that he would not receive a permanent appointment. The deputy requested, and was granted a hearing before the Civil Service Commission. The commission held that a probationary deputy sheriff must be afforded the minimum statutorily required training period before he may be dismissed at the end of his probationary period, and reinstated the deputy. The sheriff appealed to circuit court which reversed the commission. On appeal of the circuit court decision we held that it would be improper to terminate the employment of the deputy if the reasons for the termination are related to a lack of training and the deputy has not been provided a training program as required by statute. However the record did not reveal the reason for the deputy's dismissal, and we therefore remanded the case with the direction that "there must be development of facts indicating the reasons for the [deputy's] dismissal." . . .

LIBERTY INTEREST

It has long been recognized that one of the liberty interests protected by due process is a person's interest in the pursuit of a lawful occupation. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); State v. Memorial Gardens Dev. Corp., 143 W.Va. 182, 101 S.E.2d 425 (1957); Lawrence v. Barlow, 77 W.Va. 289, 87 S.E. 380 (1915). Thus this and other courts have consistently protected people from arbitrary state interference with their right to pursue a lawful occupation by demanding procedural regularity from government when it licenses private employment. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (State cannot deny application for bar admission without a due process hearing); accord, In re Griffiths, 413 U.S. 717 (1973); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); see also, Greene v. McElroy, 360 U.S. 474 (1959); (government cannot arbitrarily withdraw security clearance of civilian employed by private contractor); Pushinsky v. Board of Law Examiners, W.Va. 266 S.E.2d 444 (1980) (Board could not arbitrarily refuse to process bar applications); Kisner v. Public Sice District, W.Va. 258 S.E.2d 586 (1979) (PSC could not reduce number of vehicles that common carrier permitted to operate without hearing).

The due process concerns for fair, rational decision-making and for protection of the right to pursue lawful occupations merge when, as in the case of probationary police civil service employees, an individual seeks retention in public employment. Because government is the employer in such cases, there will necessarily be a state-derived decision directly affecting an individual's ability to pursue her chosen occupation.

This Court has traditionally shown great sensitivity toward the due process interests of the government employee by requiring substantial due process protections and imposing rational decision-making on the state employer. State ex rel. McLendon v. Morton, supra, requires a state university to provide stringent procedures before it could refuse retention for a non-tenured professor. Waite v. Civil Service Comm'n, supra, recognized that a state employee had protected due process interests in even a ten day suspension from her job. State ex rel. Bowen v. Flowers, 155 W.Va. 389, 184 S.E.2d 611 (1971), required a hearing on the suspension of a pharmacist from a pharmaceutical program administered by the Department of Welfare. State ex rel. Bronaugh v. City of Parkersburg, 148 W.Va. 568, 136 S.E.2d 783 (1964), held that a licensed physician was entitled to a hearing on his denial from a staff position at a city hospital. The city was arbitrary in not providing the doctor with reasons and a hearing. See also Airhart v. Carpenter, supra.

While not all of these cases applied a liberty interest rationale, they collectively identify a genuine constitutional concern about arbitrary decisions made at the expense of public employees. The protection afforded by these decisions, and by the private employment-licensing cases cited above, extends beyond traditional contract law. Rather they implicitly recognize a due process interest in continued public employment and in freedom from an arbitrary non-retention devoid of protective procedures.

This liberty interest in continued public employment encompasses two of the employee's most basic interests, her good name and her prospects for future employment. Thus the government cannot dismiss an employee on charges that call into question her good name, or that impose a stigma upon an employee which could foreclose her freedom to pursue other employment opportunities, without providing the employee notice of the charges against her and a hearing in which the factual basis of the charges can be contested. Board of Regents v. Roth, supra; North v. West Virginia Board of Regents, supra.

The instant case well demonstrates the need for such procedural protection. The appellees have obviously shown an arbitrary hostility towards the appellant at every stage of her efforts to become a permanent police officer for the City of Morgantown. Appellees' initial refusal to hire the appellant, despite her score on the civil service examination, was found by an agency of the federal government to have been based on unlawful sex discrimination. Appellees next attempted to terminate the appellant before her probationary period ended, but they were found by a review commission to have acted without just cause. Appellees then tried twice to terminate the appellant

on the theory that her probationary term was over and that they were free to act in the arbitrary and discriminatory manner that they had been trying to engage in throughout the case. To deny procedural protections to policewomen in these circumstances would be an affront to "liberty" and to the due process clause...

We therefore hold that a police civil service employee who is dismissed at the end of her probationary term is entitled, by virtue of her property and liberty interests in continued employment, to procedural protections designed to insure the rationality of the decision on continued employment.

THE EXTENT OF DUE PROCESS PROTECTIONS

The specific procedural protections accorded to a due process liberty or property interest generally requires consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Matthews v. Eldridge, 424 U.S. 319 (1976); Waite v. Civil Service Comm'n, supra.

Applying the first factor it is apparent that the private interest of a police civil service employee who has completed the statutory one year probationary term is of considerable importance. Permanent appointment as a police officer is a substantial right which guarantees the employee job security, and enables her to function as an officer without fear of arbitrary treatment from superiors.

Applying the second factor, the standard contained in W.Va.Code § 8-14-11 requires the appointing officer to base his decision on the conduct and capacity of the probationer. This standard is designed to prevent an erroneous or arbitrary decision. Procedural protections can only help but insure that this design is realized, and reduce the risk of an erroneous deprivation of the probationer's protected interests.

Finally, the government's interest in avoiding any increased fiscal or administrative burden of required procedural protections is minimal, when considered in light of the benefits that will inure to the city as a result of due process requirements. The city has a substantial interest in determining that only competent and qualified police officers are given permanent status. Procedural requirements can only help but insure that a fair and accurate decision is made, and that the best qualified and most competent officers are retained for permanent employment. Moreover, a city within the scope of the police civil service act already has in place the necessary procedural apparatus to insure correct and fair employment decisions through its Police Civil Service Commission.

The same procedural protections which are afforded a probationary employee during his probationary term are required upon non-retention of the employee at the conclusion of the probationary term. These procedures include the right to a written notice of the reasons for the action taken against the employee, and the opportunity for an adversarial hearing. See W.Va.Code § 8- 14-20. These procedures insure that a fair and correct decision is made, and benefit the city in that they insure that permanent positions on the police force will be filled by the most qualified candidate.

Accordingly we hold that a police civil service employee who is dismissed from employment at the end of her probationary term, is entitled to the procedural protections set out in W.Va.Code § 8-14-20. . . .

NOTES

1. *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971). The Department of Welfare violated due process when it suspended without a hearing a pharmacist's certification to dispense drugs to welfare recipients and receive payment from the Department.

2. *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). Due process requires substantial procedural safeguards before the State can terminate parental rights. The termination deprives the parent of a liberty interest grounded in "natural law."

3. *Orr v. Crowder*, 315 S.E.2d 593 (W.Va. 1983), elaborated on *McLendon*'s and *Major*'s concept of "property": "[I]t is fundamental . . that before a protected property interest, such as a right to tenure, can be found, something more than a unilateral expectation must be shown. Plaintiff must demonstrate that there existed some rules or understandings governing tenure eligibility fostered by the college upon which the college relied. . . . [L]egitimate claims of entitlement to job tenure 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"

4. *Freeman v. Poling*, 338 S.E.2d 415 (W.Va. 1985), further explained *Major*'s "liberty" analysis:

> The appellants contend they were denied a liberty interest without due process of law. They rely primarily on our opinion in [Major], where we said the law recognizes a "due process interest in continued public employment and freedom from an arbitrary non-retention devoid of protective procedures." However, we did not hold in *Major* that all public employees have a protected liberty interest in continued employment. The quotation above, and upon which appellants rely, was merely a restatement, in general terms, of our relevant case law regarding due process applications in public employment situations. It was not intended to define a constitutional *liberty* interest, which we did in Syllabus Point 2 of *Waite v. Civil Service Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977):
>
> > The "liberty interest" includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities. This principle was reiterated in [*Major*], where we recognized that a governmental discharge on charges that would damage the employee's reputation requires a hearing so that the employee can clear his name[.]

5. *State of West Virginia ex rel. K. M. v. West Virginia Department of Health and Human Resources,* 213 W.Va. 783, 575 S.E.2d 393 (2002). In addition to maintaining that the State's termination of welfare assistance substantively violated the Constitution, *see* Section C-1, *supra*, the petitioners in *State ex rel. K.M.* also challenged the manner in which the Department executed the terminations and decided on extensions. The Court first held that a welfare recipient had no right to a pre-termination hearing regarding cut-off pursuant to the five year cap on benefits. Although *Goldberg v. Kelly*, 397 U.S. 254 (1970), had held that public assistance could not be terminated prior to a meaningful hearing, the current program's cessation of benefits upon the expiration of sixty months simply did not create an issue that had to be submitted to an adversarial process for determination. (Presumably, if the Department attempts to end assistance during the five year period, then due process would require that a hearing be held before the payments are discontinued.)

Petitioners did, however, succeed in challenging the procedures used to make extension decisions. Under the then-prevailing system, an Extension Committee made an initial determination about an applicant's eligibility. Upon a denial, the applicant could request a hearing, but the decision of the Extension Committee was "final and cannot be overturned by a Fair Hearing decision, except when the decision was based on inaccurate information." According to the Court,

> What we glean from a reading of this provision is that no true right of appeal exists within the agency. For example, if a pregnant recipient applies for an extension and is denied because the Committee did not know that she was pregnant, then the Fair Hearing Examiner probably could

remand the case because the decision was based on inaccurate information about the pregnancy. However, if the Committee knew that the pregnant applicant were pregnant, but refused her extension request anyway, in apparent violation of the regulations, the Fair Hearing Examiner apparently would have no power to remand the case, because the Committee possessed accurate information.

This sort of odd, nonsensical, and irrational result is not acceptable. We have noted before that an important goal of any administrative scheme is 'to guarantee the rationality of the process through which results are determined.' *See Harrison v. Ginsberg*, 169 W.Va. 162, 171, 286 S.E.2d 276, 281 (1982). The process for granting extensions that is at issue in the instant case falls short of this goal."

6. *Trimble v. West Virginia Board of Directors, Southern West Virginia Community and Technical College*, 209 W.Va. 420, 549 S.E.2d 294 (2001). Trimble had taught in the Humanities at the College for nineteen years without incident, had positive evaluations, and was tenured. Trouble began when a new President created conflict with the faculty. Among other things, the President required all faculty to use a specific software program for assessment plans that would "allow for measuring competency-based goals which could be later used to evaluate student achievement." Trimble and others in his department believed the program was ill-suited for the Humanities, although it might be appropriate for technical and skill courses. The President persisted in spite of the protests and required all faculty to attend training sessions. Trimble failed to attend most of them and then failed to comply with other orders that he implement the new program. Ultimately, the President fired him for insubordination, a decision that was sustained in a subsequent grievance and hearing.

The Supreme Court agreed that Trimble had been insubordinate and that the school had the authority to discipline him for his misconduct. It nevertheless reversed the discharge decision. In a remarkable opinion for a four-justice majority, Justice Davis concluded that the school's failure to provide progressive discipline in Trimble's circumstances violated his due process rights. Her holding stated:

[C]onstitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in its consequences. Under such circumstances, due process requires the educational institution to impose progressive disciplinary sanctions in an attempt to correct the teacher's insubordinate conduct before it may resort to termination. W. Va. Const. art. III, § 10. . . .

Because of Mr. Trimble's property interest in continued employment with the College and his previously unblemished record, due process required the College to utilize progressive disciplinary measures against Mr. Trimble. . . . In other words, "the state may not convey a property interest, such as tenure, and then arbitrarily terminate employment in violation of that interest."

3. Substantive Due Process

Read Article III, § 10

HARTSOCK-FLESHER CANDY CO. V. WHEELING WHOLESALE GROCERY CO., 174 W.Va. 538, 328 S.E.2d 144 (1985).

MILLER, Justice:

. . . This case arises from a complaint filed in the Circuit Court of Harrison County by the

Hartsock-Flesher Candy Company and others against the Wheeling Wholesale Grocery Company. All of the parties involved are competing wholesalers in northern West Virginia. In its complaint, Hartsock-Flesher alleged that Wheeling Wholesale was selling cigarettes below cost, in violation of W.Va.Code, 47-11A-2, and requested an injunction and treble damages, pursuant to W.Va.Code, 47-11A-9.

Wheeling Wholesale moved to dismiss the complaint, claiming that the Unfair Practices Act was unconstitutional, but this motion was denied by the trial judge. Subsequently, the following [certified questions] were presented to the Circuit Court of Harrison County:

> (1) Is the Unfair Practices Act unconstitutional under the substantive due process standard established in Article III, Section 10 of the West Virginia Constitution? (2) Is the Unfair Practices Act unconstitutionally vague under Article III, Section 10 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution? . . .

The trial judge answered [the] questions in the negative, from which ruling Wheeling Wholesale now appeals.

The Unfair Practices Act was adopted in 1939. The legislature's main reason for adopting the Unfair Practices Act is summarized in W.Va.Code, 47- 11A-1, which reads, in part: "The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice." W.Va.Code, 47-11A-2, states that it is unlawful for a retailer or wholesaler to sell any product below the cost to the vendor "for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition." Violations of the Act are punishable through civil and criminal sanctions. W.Va.Code, 47-11A-9 and -11. Since the action brought against Wheeling Wholesale is civil in nature, we will not address the criminal provisions in the Act.

I.

SUBSTANTIVE DUE PROCESS

Wheeling Wholesale contends that our Unfair Practices Act should be declared unconstitutional as violative of substantive due process under Article III, Section 10 of the West Virginia Constitution, which provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." We have recognized in several cases that this provision does include a substantive due process standard. Although this constitutional provision was not mentioned in Syllabus Point 1 of State v. Wender, 149 W.Va. 413, 141 S.E.2d 359 (1965), it was mentioned in the text and its principles summarized in Syllabus Point 1:

> "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory."

See also DeCoals, Inc. v. Board of Zoning Appeals, W.Va., 284 S.E.2d 856 (1981); Thorne v. Roush, W.Va., 261 S.E.2d 72 (1979); O'Neil v. City of Parkersburg, 160 W.Va. 694, 237 S.E.2d 504 (1977); State ex rel. Harris v. Calendine, 160 W.Va. 172, 233 S.E.2d 318 (1977).

In Wender, our Cigarette Sales Act, W.Va.Code, 47-13-1 through -15, was challenged on the ground that it was unconstitutional. In examining cases from other jurisdictions, we noted that similar sales-below-cost statutes had generally been upheld and after listing several of these cases, stated:

> "The general principle derived from these cases is that the prohibition of sales below cost lies within the police power of the state and the legislature is vested with a wide discretion in determining whatever economic policy may be deemed to promote the public welfare, which policy the courts are powerless to override provided the laws passed bear a reasonable relationship to the legislative purpose and are neither arbitrary nor discriminatory." 149 W.Va. at 417, 141 S.E.2d at 362.

Despite this broad statement of deference to legislative judgment, we concluded that since the cigarette industry is not one affected with the public interest, it was a violation of due process under our State Constitution for the legislature to attempt to regulate the sale of cigarettes. Wheeling Wholesale argues that the reasoning used in Wender to invalidate the Cigarette Sales Act should be applied to the Unfair Practices Act. We are unable to agree.

Our holding in Wender is comparable to our decision in State v. Memorial Gardens Development Corp., 143 W.Va. 182, 101 S.E.2d 425, 68 A.L.R.2d 1233 (1957), in which we held that the legislature lacked the authority to regulate the funeral industry. However, Memorial Gardens was reversed in Whitener v. W. Va. Board of Embalmers, W.Va., 288 S.E.2d 543 (1982), where we held that the regulation of the funeral industry is within the legitimate scope of the State's police power. Syllabus Point 2 of Whitener states, in part: "Regulations about how businesses are conducted must simply bear a rational relationship to a legitimate state goal, to be constitutional." We also observed in Syllabus Point 3 of Whitener, quoted in part, that "[i]t is the function of legislatures to determine the wisdom and utility of economic legislation."

The point that needs to be emphasized is that the authority of our legislature to regulate economic matters in this State is quite broad, as we stated in Thorne v. Roush, W.Va., 261 S.E.2d 72, 74 (1979):

> "[T]he power of the Legislature to enact laws relating to the public welfare is 'almost plenary' under W.Va. Const. art. 6, § 1, and ... its powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of our Constitution. Robertson v. Hatcher, 148 W.Va. 239, 135 S.E.2d 675 (1964); State ex rel. County Court of Marion County v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964)."

Both Wender and Memorial Gardens are indicative of a time when substantive due process was used by courts to invalidate various laws regulating economic matters. Perhaps the most famous judicial intrusion was by the United States Supreme Court when it struck down New York's statutory limitation on the maximum number of hours that bakers could work in a week. Lochner v. New York, 198 U.S. 45 (1905). Since the intrusive approach exemplified by Lochner has subsequently been abandoned, courts rarely overturn legislation regarding economic matters on the ground that substantive due process has somehow been violated. The United States Supreme Court in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963), observed:

> "The doctrine that prevailed in Lochner ... and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." . . .

The Court in Wender failed to fully appreciate the fact that as a general rule, in matters of economic legislation, the legislature must be accorded deference, particularly under a substantive due process standard. We are not suggesting that economic legislation may never be found to violate substantive due process. There may be occasions when the use of substantive due process to invalidate legislation on some economic matters may be appropriate, such as where the challenged legislation bears no rational relationship to the public health, safety, morals, and general welfare of this State or where the statute impinges on some fundamental or constitutional right. For example, in Thorne, we held that a junior barber apprenticeship, mandated by W.Va.Code, 30-27-3, violated substantive due process because the method chosen to achieve the purpose did not promote the public welfare and intruded on the fundamental right to pursue a livelihood. . . . Neither the facts in Wender nor in the present case rise to this level of a substantive due process violation.

While we approve of the language in Syllabus Point 1 of Wender as a correct general statement of substantive due process concepts, we disapprove of the overly intrusive manner in which these principles were applied. Specifically, . . . the language in the text of Wender which indicates that because a commodity is not "affected with the public interest," the legislature may not

constitutionally regulate that commodity in this State is also disapproved. . . . [A] product or commodity does not have to be "affected with a public interest" before the legislature may constitutionally regulate the product or commodity and survive a substantive due process analysis. We, therefore, conclude that the present case is not controlled by our decision in Wender, which incorrectly applied the substantive due process principles stated therein. . . .

In adopting the Unfair Practices Act, the legislature has sought to penalize retailers and wholesalers that engage in unfair competition. We have no difficulty in concluding that the protection of healthy competition in this State is a legitimate goal of the legislature and one that obviously affects the public welfare. We also conclude that the method chosen to attain this laudable purpose is rational in the context of this case which permits a civil action for damages and an injunction by those injured. Therefore, we conclude that the Unfair Practices Act is a rational means of achieving the legitimate legislative goal of promoting healthy competition in this State by penalizing retailers and wholesalers that sell goods below cost in an attempt to destroy competition and does not violate substantive due process concepts of Article III, Section 10 of the West Virginia Constitution.

II.

VAGUENESS

The second certified question raises the issue of whether or not the Act is unconstitutionally vague under the Due Process Clauses of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution. The terms and provisions of the Act specifically challenged as undefined and vague are in W.Va.Code, 47-11A-6, which includes the terms "applicable taxes," "trade discounts," and "customary discounts for cash," and W.Va.Code, 47-11A-8(d), which states that the Act is inapplicable to any sale made "[i]n an endeavor in good faith to meet the legal prices of a competitor." Wheeling Wholesale contends that these undefined terms and provisions make it impossible for a retailer or wholesaler to clearly and fully understand the meaning of the Act.

Our general standard for determining if a particular statute is unconstitutionally vague has traditionally been applied to criminal statutes as indicated by Syllabus Point 1 of State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970):

> "There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language."

See also State ex rel. Whitman v. Fox, 160 W.Va. 633, 236 S.E.2d 565 (1977); State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974); State v. Harrison, 130 W.Va. 246, 43 S.E.2d 214 (1947).

. . . The vagueness standard may vary depending on the type of statute involved. In Village of Hoffman Estates v. Flipside, Hoffman Estates, [455 U.S. 489 (1982)], the United States Supreme Court discussed this aspect of the vagueness standard, where a licensing ordinance was attacked as vague:

> "The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."...

We have not had occasion to adopt this aspect of the vagueness standard, but we believe it is

appropriate under the Due Process Clause vagueness doctrine to apply a less restrictive test to statutes or ordinances involving economic matters in which criminal penalties are not at issue.

Furthermore, in a criminal prosecution under the Robinson-Patman Act, where the standard in Section 3 making it unlawful to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" was challenged, the United States Supreme Court in United States v. National Dairy Products Corp., 372 U.S. 29 (1963), declined to hold that this language was void for vagueness. The [Court] reviewed the history of the Act and noted "the business practices against which § 3 was unmistakenly directed" were apparent. . . . It also alluded to the fact that the vagueness doctrine did not apply with the same degree of rigor as it would where "constitutionally protected and socially desirable conduct" is involved. . . . Several courts have addressed this same argument with regard to sales-below-cost statutes and have rejected the same. . . . Consequently, we do not find the challenged portions of our Unfair Practices Act to be unconstitutionally vague under this less restrictive vagueness standard. . . .

NOTE ON THE VAGUENESS DOCTRINE

[From ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 107-08 (2nd ed., Oxford University Press, 2016).]

The vagueness doctrine combines elements of both substantive and procedural due process. At its essence, it holds that a criminal statute must, to satisfy due process of law, state its terms "with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute." State v. Blair, 190 W. Va. 425, Syl. Pt. 1, 438 S.E.2d 605 (1993); State v. Flinn, 158 W. Va. 111, 116, 208 S.E.2d 538, 541 (1974). Obviously, one concern of the doctrine is basic fairness, the core of due process. But courts have also developed the doctrine to guard against discriminatory enforcement; a vague statute confers an untoward amount of discretion on law enforcement officials and puts at risk persons of unpopular ethnic, religious, and political identities. The doctrine has been most vigorously applied when the statute affects activities involving the freedoms of speech and press. Even though a state could constitutionally limit speech to accomplish a particular goal, it cannot do so through statutes that do not precisely distinguish between prohibited and non-prohibited speech. Otherwise, individuals will engage in self-censorship; rather than risk a prosecution (or civil penalty) for protected speech, they will forego the speech entirely.

The State Supreme Court has, for the most part, faithfully applied these principles. But see Weaver v. Shaffer (1980). For example, State v. Flinn (1974) upheld most of the State's criminal law on contributing to the delinquency of a minor, but found two subsections to be unconstitutionally vague. Those invalid provisions subjected to a misdemeanor conviction any person who "contribute[d] to" the delinquency of a child by causing the child to "associate with immoral or vicious persons" or to "deport himself so as to wilfully injure or endanger the morals or health of himself or others." Similarly, State ex rel. Hawks v. Lazaro (1974) voided a provision that authorized commitment of an individual who is "in need of custody, care or treatment in a hospital and, because of illness or retardation lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization." The law violated § 10 because it was vague, lacked specific standards, and invited abuse. The same case sustained another provision, however, that authorized commitment for those who present a danger to themselves or to others. State v. Blair (1993) found unconstitutionally vague a statute that made it a crime for a public utility to fail to "establish and maintain adequate and suitable facilities for customers" and to perform "such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public." Because no one could tell what those terms meant until after there had been a jury determination, the statute could not be enforced as a criminal law. West Virginia has also recognized the need to

carefully enforce the vagueness doctrine against laws implicating the rights of expression. W. Va. C.A.G. v. Daley (1984).

As the above discussion indicates, the vagueness doctrine serves important due process purposes. Yet it is also the case in West Virginia, as elsewhere, that invalidation of a law for vagueness is rare, at least outside the free speech arena. That is, courts do not require legislators to draft statutes with mathematical precision or Cassandra-like clairvoyance.

NOTES ON RETROACTIVE APPLICATION OF BENEFITS LAWS

Workers' compensation has been a political football in West Virginia for decades, but the kicking was particularly rough in the 1990's and early 2000's. Contentions over worker fraud, freeloading, employer fraud, failure to pay premiums, costs of administration, bureaucratic bungling and delays, generous benefits, judges hostile to (or generous to) employees, skyrocketing premiums, and even official corruption have been traded back and forth among the players. In two major statutes, the Legislature attempted to address employers' concerns and produced the Workers' Compensation Reform Acts of 1995 and 2003. Among other things, the 1995 Act made the standards for permanent total disability substantially more difficult to meet, while the 2003 Act slashed the amount of benefits to be paid when awards are made. More recent amendments have essentially privatized the awards process and raised serious questions about the adequacy of the system in meeting an original goal of workers' compensation in sustaining persons injured on the job.

1. *State ex rel. Blankenship v. Richardson*

Although rejecting constitutional challenges (see Section D, *infra*) to prospectively applied changes effected by the Workers' Compensation Reform Act of 1995 (referred to below as "S.B. 250"), the Court in *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996), did strike down on due process principles the Legislature's efforts to apply the changes to at least some pre-existing claims. One of the major changes wrought by the Act was to impose a 50% "whole body impairment" as a threshold requirement to even be considered for permanent total disability ("PTD") benefits. Those satisfying the threshold requirement still had to prove that their injury (or injuries) would preclude them from obtaining future employment. Those with less than a 50% whole body impairment could not qualify for PTD regardless of whether they could ever work again. Such individuals were limited to permanent partial disability ("PPD") benefits. Pursuant to regulations, an applicant's "whole body impairment" is determined by reference to guidelines and tables published by the American Medical Association.

Portions of the Court's opinion by Justice McHugh follow.

Due Process

Having established that W.Va.Code, 23-4-6(n)(1) [1995] does not violate equal protection, we must now determine if the application of the statute to petitioner Ullom's case violated his constitutional right to due process. W.Va. Const. Art. III, § 10.

Under our due process clause, "[n]o person shall be deprived of life, liberty, or property, without due process of law," W.Va. Const. Art. III, § 10, in part (emphasis added). We have explained that "[a] 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." . . .

It is clear that petitioner Ullom, who was injured in 1988 and who subsequently received a PPD award of 32%, was entitled to consideration for an award of PTD benefits under the workers' compensation law in effect prior to the enactment of S.B. 250. Unlike S.B. 250, the prior law did not require that Petitioner Ullom have a 50% impairment in order to be considered for PTD

benefits[.] ...

Petitioner Ullom would have been, at the very least, afforded the opportunity to be considered for an award of PTD benefits. As we have already pointed out, however, S.B. 250 was introduced on February 2, 1995 and received final legislative approval only eight days later, on February 10, 1995. Moreover, S.B. 250 became effective on date of passage, the legislature having voted to override the 90-day waiting period between passage and date of effect. See W.Va. Const. Art. VI, § 30. As a result, Petitioner Ullom's substantive right to be considered for an award for PTD benefits was precluded by the instantaneous enactment of S.B. 250.

Though a workers' compensation statute, or amendment thereto, may be construed to operate retroactively where mere procedure is involved, such a statute or amendment may not be so construed where, to do so, would impair a substantive right. . . . It is clear that, but for the application of W.Va.Code, 23-4-6(n)(1) [1995] to petitioner Ullom's request for reopening for consideration of PTD benefits, his request would, at the very least, have been considered and that, further, upon proper proof, may have been awarded.

Though due process has been characterized as the "'least frozen concept of our law--the least confined to history and the most absorptive of powerful social standards of a progressive society[,]'" . . . it is ultimately measured by the concept of fundamental fairness. It is no strain upon the purpose of due process protection to conclude that the Legislature may not so narrow the avenues of justice so as to preclude petitioner Ullom's consideration for PTD benefits. . . .

Accordingly, where a workers' compensation claimant has been previously awarded permanent partial disability benefits that would have entitled the claimant to file for permanent total disability review, legislation that attempts to immediately preclude the claimant's substantive right to seek such review prior to the expiration of the ordinary ninety days provided in W.Va. Const. Art. VI, § 30, violates principles of fundamental fairness embodied in the due process provisions of [Art. III, § 10.]

2. *State ex rel. ACF Industries v. Vieweg*

After *Blankenship*, the Kanawha Circuit Court ruled in *Ferrell v. Viewig* [sic] (1997), that its holding on retroactivity should be extended to all cases in which the claim's underlying injury or last date of exposure occurred before the 1995 Act's passage date. That case was appealed, but the Supreme Court declined review. The Workers Compensation Division then issued a regulation changing its interpretation of the Act and stating that the Act did not apply retroactively to any claims. Several employers then filed a mandamus action seeking to require the Division to apply the new standards to pre-existing injuries, except those directly affected by *Blankenship*. This time, the Court took the case, and in an opinion by Justice Davis, rejected the petition. *State ex rel. ACF Industries v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). According to Davis, the Division's new rule was a reasonable interpretation of the statute and was entitled to deference. Unless the Legislature clearly expressed a contrary intent, the Court would apply the date of injury rule and would enforce the Division's reasonable regulations.

3. *Wampler Foods, Inc. v. Workers' Compensation Division*

Wampler Foods, Inc. v. Workers' Compensation Division, 216 W.Va. 129, 602 S.E.2d 805 (2004) (*per curiam*), ruled on three consolidated challenges to retroactive application of various provisions of the 2003 Act. Wampler argued that the Act's repeal of the "rule of liberality" – that the comp statute should be liberally construed to give the benefit of any doubt to the worker – should be applied to its case, which was pending on an appeal by Wampler to the Workers' Compensation Appeals Board at the time the 2003 Act became effective. That contention was doomed from the start. The repeal obviously did not take away any vested right or defense that Wampler had

previously had, and its argument, if accepted, would have required a re-examination of hundreds (at least) of pending cases.

Two other petitions included in the *Wampler* case challenged the Act's explicit direction to apply its reductions in the amount of benefits to all "awards" granted after the Act's effective date, including awards for injuries sustained prior to that date. The *per curiam* opinion repeated the Court's doctrines that Article III, § 10 "prohibits the retroactive application of changes that impair vested rights" and that "[d]ue process of law under our Constitution is ultimately measured by the concept of fundamental fairness." The Court went on to say, however, that, "in matters of economic legislation, the legislature must be accorded considerable deference under a due process standard." To sustain an argument under this deferential standard, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."

When the Court applied its analysis to the retroactive reduction of benefits, it said only that it accords "great deference" to the Division's interpretation of the statute [which should count for nothing on the constitutional question – ed.] and it could not "say beyond a reasonable doubt that such an interpretation offends constitutional due process protections. . . . Although it can easily be argued that reducing the benefits paid to injured workers is not the best possible solution to the fund's financial woes, we believe the Legislature may do so when circumstances dictate[.]"

Another worker challenged retroactive elimination of black lung claims where the applicant's x-ray reveals pneumoconiosis but other tests do not reveal any lung impairment. Prior law provided for such applicants to be awarded a 5% PPD, but the Act eliminated that benefit. The Court said the analysis here was the same as for the reduced benefits: "We cannot say beyond a reasonable doubt that the Division's interpretation . . . violated the Due Process Clause of our *Constitution*."

Finally, a set of petitioners with pre-Act injuries alleged that they had submitted their claims well before the Act's effective date but that the Division's failure to decide their cases within the time frame prescribed by the regulations caused the determinations on their awards to be subjected to the Act's reduced benefits provisions. Petitioners alleged those facts stated a violation of due process. The Court declined to reach the issue, claiming the record before it was inconclusive on the facts.

4. 2005 Statutory Rewrite

Most of the issues raised in the above-discussed cases dissipated with the 2005 enactment of a law that completely changed the system and had the effect of greatly reducing available benefits. The statute essentially privatized workers' compensation and handed the administration of the system over to private insurance companies. Whether the current system is adequate to support employers' immunity from workers' common law claims seeking damages for workplace injuries is a question that raises serious issues under the Certain Remedies Clause in Article III, § 17, *infra*.

STATE EX REL. HARRIS V. CALENDINE,
160 W.Va. 172, 233 S.E.2d 318 (1977).

NEELY, Justice.

This habeas corpus proceeding calls into question the constitutional validity of West Virginia's classification and disposition of juvenile offenders. The Court does not find unconstitutional W. Va. Code , 49-1-4 (1941), which defines a "delinquent child, " or W. Va. Code, 49-5-11 (1975), which authorizes certain methods of disposition for children adjudged delinquent; nevertheless, we find that definite guidelines are needed to prevent these statutes from being unconstitutionally applied in violation of West Virginia Constitution , Art. III, § 10, the due process clause, and West Virginia Constitution , Art. III, § 5, the cruel and unusual punishment clause.

The petitioner, Gilbert Harris, is a 16 year old boy now confined in the Davis Center, a forestry

camp for boys, pursuant to an order of the Calhoun County Juvenile Court adjudging the petitioner delinquent because he had been absent from school for 50 days. On April 9, 1976, the Director of Supportive Services for the Calhoun County Board of Education petitioned the juvenile court to find Mr. Harris either neglected or delinquent because of his irregular school attendance. A summons was served on petitioner's mother and stepfather stating that they were required to appear before the Calhoun County Juvenile Court, and after several continuances a hearing was finally held on May 17, 1976 at which the petitioner, his attorney, and petitioner's mother appeared. At the hearing the petitioner did not deny the allegations against him and was adjudicated a delinquent child. The juvenile court committed the petitioner to the care, custody, and control of the Commissioner of Public Institutions for the State of West Virginia for assignment to the Industrial School for Boys at Pruntytown until the petitioner became 16 years old in July 1976. Upon reaching age 16, petitioner was to be reassigned to a Youth Center for the balance of a one year period, after which he was to be remanded to the custody of the Calhoun County Juvenile Court. Petitioner had never been charged with a delinquent act before the bringing of the petition now under review and had never previously appeared before the juvenile court. Furthermore, petitioner was nearly 16 at the time he was adjudged delinquent for truancy, and he was ordered incarcerated for almost a year past the legal age when school attendance is required.

. . . Petitioner lived in a remote, rural section of Calhoun County and had some difficulty getting to school during the winter months. More importantly, however, it appears that the petitioner was ridiculed and shunned by his classmates because he suffered from a facial disfigurement and was mildly retarded. Petitioner had been enrolled in a special education class during junior high school and high school, but the record does not disclose any details about those classes in the local schools or the programs offered by either the industrial school at Pruntytown or the Forestry Camp at Davis. . . .

I

The primary question presented by this proceeding is whether [W. Va. Code 49-1-4 and W. Va. Code 49-5-11] establish methods for handling juvenile offenders which are inherently unconstitutional. These West Virginia statutes, which indiscriminately combine status offenders[1] with criminal offenders, present an enormous potential for abuse and unconstitutional application. Nonetheless, under the doctrine of the least obtrusive remedy, this Court will avoid striking down legislation whenever ". . . there is an adequate remedy to prevent such legislation from being unconstitutionally applied. " Point 4, Syllabus, State ex rel. Alsop v. McCartney, W. Va. , 228 S.E.2d 278 (1976). To save these statutes from constitutional infirmity and to assure that they will be constitutionally applied, this Court will discuss the perimeters dictated by the Constitution of the State of West Virginia which circumscribe their application.

W. Va. Code , 49-1-4 (1941) establishes the conditions under which a child may be adjudicated delinquent. That Section provides:

'Delinquent child' means a person under the age of eighteen years who:

(1) Violates a law or municipal ordinance;

(2) Commits an act which if committed by an adult would be a crime not punishable by death or life imprisonment;

(3) Is incorrigible, ungovernable, or habitually disobedient and beyond the control of his parent, guardian, or other custodian;

(4) Is habitually truant;

(5) Without just cause and without the consent of his parent, guardian, or other custodian,

[1]A status offender, for the purposes of this opinion, may be defined as a child who "is beyond the control of his parents or is engaging in non-criminal conduct thought to be harmful to himself . . . " . . . or who commits acts, which if committed by an adult, would not be crimes.

repeatedly deserts his home or place of abode;
(6) Engages in an occcupation which is in violation of law;
(7) Associates with immoral or vicious persons;
(8) Frequents a place the existence of which is in violation of law;
(9) Deports himself so as to wilfully injure or endanger the morals or health of himself or others.[2]

Once a child has been adjudicated delinquent the methods of court disposition are set forth by W. Va. Code , 49-5-11 (1975) which provides as follows:

With a view to the welfare and interest of the child and of the State, the court or judge may, after the proceedings, make any of the following dispositions:
(1) Treat the child as a neglected child, in which case the provisions of article six [§ 49-6-1 et seq.] of this chapter shall apply; (2) Order the child placed under the supervision of a probation officer;
(3) If the child be over sixteen years of age at the time of the commission of the offense the court may, if the proceedings originated as a criminal proceeding, enter an order showing its refusal to take jurisdiction as a juvenile proceeding and permit the child to be proceeded against in accordance with the laws of the State governing the commission of crimes or violation of municipal ordinances;
(4) Commit the child to an industrial home or correctional institution for minors;
(5) Commit the child to any public or private institution or agency permitted by law to care for children;
(6) Commit the child to the care and custody of some suitable person who shall be appointed guardian of the person and custodian of the child;
(7) Enter any other order which seems to the court to be in the best interest of the child.

Both of these statutes must be interpreted and applied in conformity with West Virginia Constitution , Art. III, § 10, which provides "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers " and West Virginia Constitution , Art. III, § 5, which provides in part, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. . . "

Inherent in the due process clause of the State Constitution are both the concept of substantive due process and the concept of equal protection of the laws.[3] In order for the statutory scheme concerning juvenile delinquents to withstand consitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or

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[2]"Subsections 7 and 9 of Code , 49-1-4, (1931) as amended, defining a delinquent child as one who '[a]ssociates with immoral or vicious persons' and as one who '[d]eports himself so as to wilfully injure or endanger the morals or health of himself or others' are void as violative of the Due Process Clause of art. III, § 10 of the Constitution of West Virginia and the Fourteenth Amendment of the Constitution of the United States . " Point 6, Syllabus, State v. Flinn, W. Va. , 208 S.E.2d 538 (1974).

[3]In the continuously evolving tradition of Anglo-American common law there can be no fixed definition of due process of law, which is an inherently elusive concept; nevertheless, it is apparent that due process of law under the West Virginia Constitution contains an equal protection component the scope and application of which are coextensive or broader than the equal protection clause of the Fourteenth Amendment to the United States Constitution. See, Johnson v. Robison, 415 U.S. 361 (1974) which imports the equal protection clause of the Fourteenth Amendment into the Fifth Amendment to the United States Constitution , the due process language of which is nearly identical to that found in West Virginia Constitution , Art III, § 10. See also, Linger v. Jennings, 143 W. Va. 57, 99 S.E.2d 740 (1957), which strongly suggests that West Virginia Constitution, Art. III, § 10 affords West Virginia citizens a guarantee of equal protection of the laws as a matter of State constitutional doctrine.

discriminatory.[4] Furthermore, under the equal protection standard it must appear that the statutes do not invite invidious discrimination based on race, color, creed, sex, national origin, or social class.

The cruel and unusual punishment standard requires that no person be punished unless he has done something which is generally recognized as deserving of punishment. Furthermore, as we implied in State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974), the state cannot punish a person in fact while alleging to rehabilitate or otherwise help him.

The statutes under consideration, in the absence of guidelines for their application, fail to meet the equal protection, substantive due process, and the cruel and unusual punishment standards because they permit the classification and treatment of status offenders in the same manner as criminal offenders.

II

We are not concerned with whether a child may be committed to a state correctional facility such as Pruntytown or the Davis Center when, in the language of subsections 1 and 2 of Code , 49-1-4 (1941), the child either violates a law or municipal ordinance or commits an act which if committed by an adult would be a crime not punishable by death or life imprisonment. These subsections provide for both punishment and rehabilitation of those children who commit criminal acts which have long been recognized at common law.

We are, however, concerned with incarceration of children for status offenses. Particularly in the language of subsections 3 through 6 and subsection 8 of Code , 49-1-4 (1941) we are concerned with a child who is incorrigible, ungovernable, habitually disobedient and beyond the control of his parents, truant, repeatedly deserts his home or place of abode, engages in an occupation which is in violation of law, or frequents a place the existence of which is in violation of law. The Legislature has vested the juvenile court with jurisdiction over children who commit these status offenses so that the court may enforce order, safety, morality, and family discipline within the community. The intention of the law is laudable; however, the means employed to accomplish these ends are unconstitutional insofar as they result in the commitment of status offenders to secure, prison-like facilities which also house children guilty of criminal conduct, or needlessly subject status offenders to the degradation and physical abuse of incarceration.

At the outset the Court should make clear that we are not impressed with euphemistic titles used to disguise what are in fact secure, prison-like facilities. We define a secure, prison-like facility, regardless of whether it be called a "home for girls, " "industrial school, " "forestry camp, " "children's shelter, " "orphanage, " or other imaginative name, as a place which relies for control of children upon locked rooms, locked buildings, guards, physical restraint, regimentation, and corporal punishment. Somehow, it appears to us that if the State's purpose is to develop a society characterized by peace and love, that our institutions for children should reflect those qualities and not their opposite. In fact, as we shall develop shortly, the status offender has a constitutional right, if not to love, at least to the absence of hate.

W. Va. Code , 49-5-11 (1975) provides a number of methods of disposition for juvenile offenders, including placing the delinquent child under supervised probation, committing the child

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[4]While the substantive due process requirements of the United States Constitution have been subject to some erosion, see Ferguson v. Skrupa, 372 U.S. 726 (1963), the concept of substantive due process within the United States Constitution is still alive. See, Roe v. Wade, 410 U.S. 113 (Stewart, J. concurring) (1973); Rouse v. Cameron, 373 F.2d 451 (D.C.Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (D.C.Ala. 1971). In any event, substantive due process remains a viable concept under West Virginia Constitution , Art. III, § 10, and in evaluating whether statutes meet substantive due process requirements, a West Virginia court must adhere to the following basic standard: ". . . to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary or discriminatory. " Syllabus Point 1, State v. Wender, 149 W. Va. 413, 141 S.E.2d 359 (1965). See also, State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974).

to a public or private institution or agency, committing the child to the care and custody of some suitable person, entering any other order which would appear to be in the best interest of the child, and then finally committing the child to an industrial home or correctional institution for minors, i.e. , a secure, prison-like facility. It is parsimony which circumscribes our courts' ability to treat status offenders constitutionally, not the absence of statutory authority.

The Equal Protection Standard

We find that with regard to the status offender the procedure for disposition set forth in [§ 49-5-11] can be applied in a manner repugnant to the basic principles of equal protection because it discriminates invidiously against children based upon social class, sex, and geographic location. It is obvious that a child from a family with financial resources will have an opportunity to use private institutional facilities which are far less restrictive, less dangerous, and less degrading than public correctional institutions. . . .

The Substantive Due Process Standard

Furthermore the Court finds no rational connection between the legitimate legislative purposes of enforcing family discipline, protecting children, and protecting society from uncontrolled children, and the means by which the State is permitted to accomplish these purposes, namely incarceration of children in secure, prison-like facilities.

It is generally recognized that the greatest colleges for crime are prisons and reform schools. The most egregious punishment inflicted upon a child incarcerated in a West Virginia penal institution is not the deprivation of his liberty but rather his forced association with reprehensible persons. Prisons, by whatsoever name they may be known, are inherently dangerous places. Sexual assaults, physical violence, psychological abuse and total degradation are the likely consequences of incarceration. If one hopes to find rehabilitation in a penal institution, his hopes will be confounded.

This Court held in the case of State ex rel. Hawks v. Lazaro, supra, that the doctrine of parens patriae "has been suspect from the earliest times" and that when the State is proceeding under color of its parens patriae authority, it must actually have fair prospects of achieving a beneficient purpose, otherwise the reason for the authority fails. Hawks, supra, concerned the constitutional validity of West Virginia's mental health commitment statutes which this Court found to be violative of due process. In Hawks this Court subjected the State's incarceration of the mentally ill to a substantive due process test. The Court said[:]

> "The theoretical beneficence of the State with regard to its citizens has been used in justification of state custody or guardianship from the medieval period to our own day, although the disparity between the theory of beneficence and the practice of cruelty and inhumanity has often been the subject of literature (see, Dickens, Oliver Twist; Bronte, Jane Eyre.) There is persuasive evidence that the alleged improvement in treatment in modern state facilities from medieval times to our own is more myth than reality, see, Wyatt v. Stickney, 325 F. Supp. 781 (D.C.Ala. 1971) and that at the current low level of sociological and psychological knowledge, combined with the current parsimonious level of governmental support for state institutions, the state and its officers have a limited therapeutic role and a predominantly custodial role.
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> In recognition of the conditions which exist at state institutions, numerous courts have recently required the state to demonstrate a reasonable relationship between the alleged harm which a person is likely to do to himself and the treatment designed to ameliorate the illness which may cause that harm. For example, in Darnell v. Cameron, 121 U.S.App.D.C. 58, 348 F. 2d 64 (1965) the Court stated that mandatory confinement rests upon the supposition of the necessity for treatment, and that if there is no treatment, a committed individual can bring a habeas corpus proceeding to question the constitutionality of his involuntary hospitalization; also, in Medberry v. Patterson, 188 F. Supp. 557 (D.C., Colo. 1960) the Court held that an involuntarily committed patient is entitled to treatment and lack of such treatment cannot be justified by a lack of staff or facilities. Accordingly the ancient doctrine of parens patriae is in full retreat on all fronts except in those very narrow areas where the state can demonstrate, as a matter of fact, that its care and

custody is superior to any available alternative. In re Gault, 387 U.S. 1 (1967); In re Simmons Children, 154 W. Va. 491, 177 S.E.2d 19 (1970); In re Willis , W. Va. (decided December 11, 1973). Therefore, in determining whether there is any justification under the doctrine of parens patriae for deviation from established due process standards, it is appropriate for this Court to consider that the State of West Virginia offers to those unfortunates who are incarcerated in mental institutions Dickensian squalor of unconscionable magnitudes."

We apply the same substantive due process standards to the commitment of children for status offenses, since such commitment has always been justified on the same parens patriae grounds as commitment of the mentally ill. In theory, the commitment of the mentally ill has been to protect them from themselves as well as to protect society from their actions. Essentially the same rationale exists for commitment of juvenile status offenders. That is, they must not be permitted to injure themselves, and society must protect itself from their actions. We find with regard to status offenders the same fact we found in Hawks, supra, with regard to the mentally ill, that the State means, namely incarceration in secure, prison-like facilities, except in a limited class of cases, bears no reasonable relationship to legitimate State purposes, namely, rehabilitation, protection of the children, and protection of society.

In view of the foregoing, and in view of the fact that there are numerous alternatives to incarceration for status offenders[9] we hold that the State must exhaust every reasonable alternative to incarceration before committing a status offender to a secure, prison-like facility. Furthermore, for those extreme cases in which commitment of status offenders to a secure, prison-like facility cannot be avoided, the receiving facility must be devoted solely to the custody and rehabilitation of status offenders. In this manner status offenders can be spared contact under degrading and harmful conditions with delinquents who are guilty of criminal conduct and experienced in the ways of crime.

However, this does not limit the authority of the juvenile court to house and educate status offenders and criminal offenders together in shelter homes, residential treatment centers, and other modern facilities staffed by well trained, attentive, and dedicated people, where the atmosphere is characterized by love and concern rather than physical violence, corporal punishment and physical restraint of liberty, provided the court determines there is no danger to the physical safety or emotional health of the status offender.

The Cruel and Unusual
Punishment Standard

In the case before us we are confronted with a child who was obviously in need of help, and yet the State chose to degrade him, to humiliate him, and to punish him by sending him to institutions which fail to meet his needs and cannot help him.

At the outset the Court acknowledges that the cruel and unusual punishment standard cannot easily be defined and certainly is not fixed; consequently, we feel the standard tends to broaden as society becomes more enlightened and humane. See, State ex rel. Pingley v. Coiner, 155 W. Va. 591, 186 S.E.2d 220 (1972). The standard ought to be especially broad in its application to status offenders, whom the State has pledged not to punish at all, but rather, to protect and rehabilitate.

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[9]Such alternatives include, but are not limited to, supervised probation, specialized foster care arranged through the Department of Welfare; non-secure, adequately supervised residential shelter facilities similar to the Children's Home Society, Wheeling and "Patchwork " in Charleston; a group home program, with structured live-in treatment, and access to counseling and psychiatric care, similar to the Davis-Stuart group homes in Bluefield, Princeton, Beckley and Fayetteville; residential treatment in a hospital setting for status offenders with psychological or emotional problems, similar to Opportunity Hall at Spencer State Hospital; and a residential center for intensive treatment outside the hospital setting, staffed by psychologists and medical professionals. Other satisfactory alternatives to incarceration could also be developed by a society solicitous of the welfare of its children and dedicated to treating the special problems of status offenders.

Furthermore, status offenders are not guilty of the criminal conduct which ordinarily serves to make society's exercise of the penal sanction legitimate.

[For the] foregoing reasons, we conclude that the incarceration of status offenders in secure, prison-like facilities along with children guilty of criminal conduct inflicts a constitutionally disproportionate penalty upon status offenders, and as such, violates West Virginia Constitution, Art. III, § 5.

III

Accordingly, we hold that a status offender may still be adjudged delinquent under W. Va. Code , 49-1-4 [1941]; however, before he may be committed to a penal institution pursuant to the provisions of W. Va. Code , 49-5-11(4) [1975], there must be evidence on the record which clearly supports the conclusion, and the juvenile court must specifically find as a matter of fact, that no other reasonable alternative either is available or could with due diligence and financial commitment on the part of the State be made available to help the child, and that the child is so totally unmanageable, ungovernable, and anti-social that he or she is amenable to no treatment or restraint short of incarceration in a secure, prison-like facility. Furthermore, to reiterate in this context what we said above, no status offender in any event, regardless of incorrigibility, may be incarcerated in a secure, prison-like facility which is not devoted exclusively to the custody and rehabilitation of status offenders. We emphasize here that State parsimony is no defense to an allegation of deprivation of constitutional rights. The State may not punish a person not deserving of punishment merely because such action serves the State's interest in convenience or frugality. . . .

Consequently, the standard which the juvenile court must apply is not a standard of what facilities are actually available in the State of West Virginia for the treatment of juvenile status offenders, but rather a standard which looks to what facilities could reasonably be made available in an enlightened and humane state solicitous of the welfare of its children but also mindful of other demands upon the State budget for humanitarian purposes. We recognize that problems may arise, as for example, when a court is located in a rural part of West Virginia which lacks child-care facilities, and the court has no place to send a status offender except a correctional facility. Nevertheless, in such cases, if rehabilitation of the status offender could be accomplished by his commitment to a well-run, centralized state residential treatment center, or a local shelter facility where a small number of children live with professionally trained house parents, or by any other reasonable method, then the juvenile judge, as a matter of state constitutional law, must make a disposition under Code 49-5-11 (1975) which does not involve commitment to a secure, prison-like facility, or he must discharge the defendant.

For the foregoing reasons the writ of habeas corpus for which the petitioner prays is awarded and it is ordered that the petitioner be discharged forthwith from custody and restored to his liberty. Children currently committed to State facilities in violation of the guidelines enunciated in this opinion may bring actions in habeas corpus in the local circuit courts. It is further ordered that the Clerk of this Court shall send three copies of this opinion to the superintendents of each and every correctional facility in which juvenile offenders are committed together with an order of this court that those copies be posted in conspicuous places.

NOTE

Sale v. Goldman, 208 W.Va. 186, 539 S.E.2d 446 (2000) (*per curiam*), presented the Court with a challenge to a Charleston ordinance that imposed a curfew on juveniles under eighteen. Qualified by numerous exceptions, the law prohibited juveniles from being outside after 10:00 P.M. on Sundays through Thursdays and after midnight on Fridays and Saturdays. Although recognizing that adults enjoy a "fundamental" right to move about freely, the Court concluded that juveniles' freedom of movement has a lesser status. "[J]uveniles, unlike adults, are always in some form of custody" and "do not have a fundamental right to be on the streets at night without adult

supervision." As the ordinance rationally advanced the city's interests in preventing juvenile crime and protecting the safety of youths, the ordinance satisfied due process requirements.

GOLDEN V. BOARD OF EDUC.,
169 W.Va. 63, 285 S.E.2d 665 (1981).

McGRAW, Justice

On March 27, 1980, the Circuit Court of Harrison County entered an order affirming the action of the Harrison County Board of Education (hereinafter cited as Board of Education or Board) wherein, pursuant to W. Va. Code § 18A-2-8 (1977 Replacement Vol.), it dismissed the appellant, Arlene Golden, from her position as high school guidance counselor.

The appellant was employed by the Board of Education as a high school guidance counselor beginning in 1974. On December 11, 1978, she was arrested at Watson's Department Store in the Middletown Mall for felony shoptlifting. On December 20, 1978, she pled nolo contendere in a magistrate court and was fined $100 for the misdemeanor of petty theft. News of this was published in the local newspaper.

By letter dated January 18, 1979, the Board informed Golden that it considered the shoplifting incident and the resulting fine to be a "serious act of immorality " under W. Va. Code § 18A-2-8[,] and dismissed her effective January 19, 1979, pending her right to request a hearing before the Board on the matter. . . . On February 27, 1979, a hearing was held at which Golden was present along with her West Virginia Education Association (WVEA) representatives. At the hearing of February 27, Golden elucidated the incident upon which the Board had based its action. She testified that she had been "totally distraught " because she was going to have to go to Washington, D.C., to place her aged, crippled mother, a mugging victim, into a nursing home and because subsequent to her arrival at the mall she had talked by telephone with her sixteen-year-old daughter who hysterically related that she had just wrecked the family car. While waiting for some monograming to be completed she picked up several items and walked inadvertently out of the store. She stated that she had walked 50 feet or so from the store, when she realized that the items were in her purse and stopped in order to turn around and go back to the store. She was apprehended at this time by a store detective.

At the hearing, evidence was presented by Mrs. Golden, other teachers, and school administrators, all of which went to support her professional competency. At the hearing the next day, the Board met in closed session and, based on all the evidence available to it, concluded that Golden's employment should be terminated. Mrs. Golden appealed this decision to the Circuit Court of Harrison County, which affirmed the action of the Board. It is from that judgment that she appeals. . . .

[West Virginia] Code § 18A-2-8 . . . authorizes a county board of education to suspend or dismiss any of its employees at any time for "[i]mmorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty. " The statute does not define immorality and this Court has not been referred to, nor has it located, any case decided in West Virginia which construes the meaning of the term "immorality " within the context of this Code section.

Immorality is an imprecise word which means different things to different people, but in essence it also connotes conduct "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior." Webster's New Twentieth Century Dictionary Unabridged 910 (2d ed. 1979).

When confronted with this problem courts seek to determine if a "rational nexus " exists between the conduct complained of and the duties to be performed. In Thurmond v. Steele, 159 W.Va. 630, 225 S.E.2d 210 (1976), which involved the dismissal of a civil service employee who was charged

with driving while intoxicated, failure to obey an officer, driving recklessly, and leaving the scene of an accident in which he had been involved, the Court reversed the Civil Service Commission's dismissal on the ground that the charges were "based on conduct which had no rational nexus with the duties to be performed or the rights and interest of the public. " Id. at 213. Thus, the primary principle to be gleaned from Thurmond is that conduct of a state or public employee outside the job may be examined, but disciplinary action against the employee based upon that conduct is proper only where there is a proven "rational nexus " between the conduct and the duties to be performed.

There is a corollary to this principle. Although it is undisputed that a teacher holds a strategic position in the shaping of young minds, and although the State may legitimately look into a teacher's conduct outside the classroom, . . . nonetheless, the conduct in question must indicate unfitness to teach. No abstract characterization of the conduct per se as "immoral " is sufficient. In the words of the leading case in this area "[n]o person can be denied government employment because of factors unconnected with the responsibilities of that employment." Morrison v. State Board of Education, 1 Cal.3d 214, 235, 82 Cal. Rptr. 175, 191, 461 P.2d 375, 391 (1969). Thus, the courts look first to the question of immoral behavior and then to see if that behavior has in some way made the teacher unfit to carry out his or her responsibilities or if it has impaired or threatened the welfare of the school community. See Morrison v. State Board of Education, supra; Erb v. Iowa State Board of Public Instruction, 216 N.W.2d 339 (Iowa 1974); Lindgren v. Board of Trustees, High School District No. 1, 171 Mont. 360, 558 P.2d 468 (1976).

One reason for requiring a showing that the alleged immoral conduct has a resulting impact upon the teacher's fitness to teach or upon the school community is that to examine only the conduct itself would result in a statute that would be void for vagueness under substantive due process constitutional standards.

> "Without such a reasonable interpretation the terms [immoral, unprofessional, and the like] would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state. In the opinion of many people laziness, gluttony, vanity, selfishness, averice, and cowardice, constitute immoral conduct . ...
>
> "A more constricted interpretation of "immoral ", "unprofessional " and "moral turpitude " . . . enabl[es] the State Board of Education to utilize its expertise in educational matters rather than having to act "as the prophet to which is revealed the states of morals of the people of the common conscious. " [Morrison.]

Another reason for requiring a showing that the alleged immoral conduct has a resulting impact upon the teacher's fitness to teach or upon the school community is that to allow dismissal merely upon a showing of some immoral conduct would constitute an unwarranted intrusion upon the teacher's right of privacy. This right of privacy, while not absolute, must be balanced against the legitimate interest of the school board. The conduct of a teacher ceases to be private in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position. . . .

In the case now before this Court, the only evidence submitted to the Board to support the charge of immorality were the records of the magistrate indicating the arrest on the aforestated charge and Mrs. Golden's plea of nolo contendere thereto. The Board apparently adopted the view that conviction on the misdemeanor charge was per se immoral conduct within the meaning of the statute, or that it could dismiss Mrs. Golden if the Board members believed that her act was inconsistent with good order and proper personal conduct. Thurmond v. Steele, supra, importantly, and Morrison v. State Board of Education, supra; and Lindgren v. Board of Trustees, High School District No. 1, supra hold to the contrary.

The only evidence in the record before the Board relating to fitness to teach was the favorable testimony of Mrs. Golden's fellow teachers and of the principal and assistant principal at her high

school. From this evidence, the Court concludes that the Board was presented with no evidence from which it could conclude that the petitioner was unfit to teach. Indeed, the evidence indicates that it should have concluded the opposite.

For the reasons set forth above the order of the Circuit Court of Harrison County affirming the decision of the board of education of that county is hereby reversed and this action is remanded to that court with instructions to direct the board of education to reinstate Arlene Golden with restoration of the pay she lost as a result of her dismissal.

[A dissenting opinion by Justice Neely is omitted.]

STATE ex rel. ROY ALLEN S. v. STONE,
196 W.Va. 624, 474 S.E.2d 554 (1996).

CLECKLEY, Justice.

In this original proceeding in prohibition, we must decide whether W.Va.Code, 48A-6-1 (1993), violates the Due Process Clause in Section 10 of Article III of the West Virginia Constitution. The relator, Roy Allen S. (Roy), requests this Court to issue a rule to show cause why a writ of prohibition should not be issued against the respondent, the Honorable Robert B. Stone, Chief Judge of the Circuit Court of Monongalia County, as a result of the circuit court's order and opinion directing that a blood sample be taken from the minor child, Jennifer S. (Jennifer), for the purpose of determining her paternity.

FACTUAL AND PROCEDURAL HISTORY

Roy and Tina Marie P.S. (Tina),[4] were married on January 29, 1983. Roy and Tina had a very tumultuous relationship. According to the respondent, Thomas S. (Thomas), Tina became pregnant by him on September 1, 1986. Tina gave birth to Jennifer on June 1, 1987, and designated on the birth certificate that Roy was the father of the child, even though Thomas was present during the birth of the child. Roy did not return to his wife until some time after the birth of Jennifer. Over the course of three years, Roy's and Tina's relationship did not improve. According to Thomas's brief, Tina maintained contact with Thomas during this period and took Jennifer to visit him frequently. Tina eventually filed for divorce and began living with Thomas. At that time, Tina had custody of her two children. Thomas stated he undertook various caretaking responsibilities and the children developed a strong bond with him during this period.

According to Roy's brief, in the complaint for divorce filed by Tina on July 22, 1991, she specifically alleged "'two children were born of the marriage, Christina [S.] ..., born September 19, 1983[,] and Jennifer [S.] ..., born June 1, 1987.'" ... In his answer to the complaint, Roy admitted two children were born of the marriage. On or about August 6, 1992, Tina signed a joint parenting agreement which indicated she and Roy had reached an agreement concerning joint custody that was for the benefit "of their children."...The circuit court entered the final divorce decree which approved the joint parenting agreement . . ..

Sometime after entry of the divorce decree, Tina filed a petition to change and modify custody as set out in the final divorce decree. Specifically, Tina wanted full custody of the two children and additional support from Roy. Roy filed a counter petition seeking custody of the two children. A full evidentiary hearing concerning the petitions for custody was held on December 8, 1992. At this hearing, both Roy and Tina testified the two minor children were born of their marriage. The family law master then filed his Findings of Fact and Conclusions of Law on December 14, 1992, which granted Roy full custody of both minor children.

[4]Tina married the respondent, Thomas S., after her divorce from Roy.

On December 23, 1992, Tina filed a petition for review of the family law master's findings alleging Roy was not the biological father of Jennifer. By a memorandum order dated February 3, 1993, the circuit court denied Tina's petition for review citing that Tina "testified on at least two (2) occasions that Jennifer was born as a result of the marriage of the parties ... [and that] both parties held ... [Roy] ..., out to the world as the father of Jennifer." Affirming the family law master's findings, the circuit court also found "'it is inappropriate, insensitive and boarding [sic] on unconscionable'" to assert for the first time on review that someone other than Roy, who was Tina's ex-husband, might be the biological father of the child. In her response to the petition for a writ of prohibition, Tina explains that she admitted during the divorce proceedings that Roy was the father of the two minor children because her then-attorney advised her she could not raise the issue of paternity in that forum. Apparently after obtaining new counsel, Tina first raised the issue of paternity during her petition for review of the family law master's findings. Under Tina's accounting of the facts, Jennifer was conceived at a time when she and Roy were living separate and apart although still legally married.

On April 15, 1994, Thomas filed a paternity action against Tina and Roy asserting that he, and not Roy, is the biological father of Jennifer. On June 22, 1994, a hearing was conducted by the family law master. In his recommended order filed on September 13, 1994, the family law master dismissed Thomas's petition finding he had no standing to bring the paternity action. Both Tina and Thomas filed petitions for review of the family law master's order. . . . On November 28, 1995, the circuit court entered an order reversing the family law master's dismissal of the paternity action and remanding the matter back [for] proceedings consistent with the memorandum order. Expressing concern that the family law master's interpretation of W. Va.Code, 48A-6-1(e)(8), raised serious constitutional concerns of equal protection and due process, the circuit court held Thomas, as the putative biological father, was entitled to pursue his paternity action. . . . The circuit court subsequently appointed a guardian ad litem for Jennifer. Roy filed a petition for a writ of prohibition to be issued by this Court to prevent the paternity test for Jennifer.

II.

DISCUSSION

A. Procedural Issues

At the center of this controversy is the question whether a person claiming to be the biological father of a child may raise the issue of paternity if the child was born during a valid marriage between the mother and another man. The relevant statute, W. Va.Code, 48A-6-1(e), provides, in part:

"A paternity proceeding may be brought by any of the following persons:

"(1) An unmarried woman with physical or legal custody of a child to whom she gave birth;

"(2) A married woman with physical or legal custody of a child to whom she gave birth, if the complaint alleges that:

"(A) Such married woman lived separate and apart from her husband preceding the birth of the child;

"(B) Such married woman did not cohabit with her husband at any time during such separation and that such separation has continued without interruption; and

"(C) The defendant, rather than her husband, is the father of the child;

"(3) The state of West Virginia or the department of health and human resources, or the child advocate office on its behalf, when such proceeding is deemed necessary to prevent such child from being or becoming a public charge;

"(4) Any person who is not the mother of the child, but who has physical or legal custody of such a child;

"(5) The guardian or committee of such a child;

"(6) The next friend of such child when the child is a minor;

"(7) By such child in his own right at any time after the child's eighteenth birthday but prior to the

child's twenty-first birthday; or

"(8) A man purporting to be the father of a child born out of wedlock, when there has been no prior judicial determination of paternity."

The circuit court feared that precluding a putative biological father from seeking a paternity determination under the statute would threaten its constitutionality. To avoid the threat, the circuit court read the language a "child born out of wedlock" in subsection (8) to include a child born to a married woman but fathered by someone other than her husband. By that reading, the circuit court permitted Thomas to raise the issue of paternity. . . .

B.

The Constitutionality of
W.Va.Code, 48A-6-1

Proceeding to the merits of the petition, we believe it is necessary to resolve directly the constitutional issue. Courts may not reform statutes to correct perceived inadequacies. What the circuit court did was not a construction of the statute, but was, in effect, an enlargement of the statute so that what was omitted, either by design or inadvertence, could be included within its scope. To supply these omissions by way of statutory construction transcends the judicial function. . . . Unlike the circuit court, we choose not to rewrite the statute but choose to construe it consistent with its plain meaning.[10] . . . [W]e conclude that none of the statutory arguments persuade us that the Legislature intended W. Va.Code, 48A-6-1(e), to allow sub silentio standing to an alleged biological father other than explicitly provided therein.

Under the common law, a child born to a married woman was presumed to be the product of the marriage, and her husband was the presumed father. The presumption could be overcome only by proof of the husband's absence or impotence and could not be assailed at all by individuals outside the marriage. Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989). W. Va.Code, 48A-6-1, et seq., which modified some aspects of the common law, permits a putative biological father to bring a paternity action only if the child has no presumed father. Other parties, however, including the husband, wife, child, and the State, may have standing to initiate a paternity action, even though the child was born in wedlock, and may use such action to require a putative biological father who is not married to the mother to honor child support obligations. This scheme, Thomas contends, violates his rights to due process and equal protection of the law. Because we agree with Thomas that the bar to his paternity claim violates due process, we do not consider his equal protection arguments.

In determining whether a law violates the Due Process Clause in Section 10 of Article III of the West Virginia Constitution, the first step is to determine whether the challenged provision implicates a liberty interest.[12] In this case, we must decide whether a putative biological father has a liberty

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[10]The circuit court relied on the proposition that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court should construe the statute to avoid such problems. This canon of statutory construction is based on the prudential concern that constitutional issues not be needlessly confronted and on respect for the Legislature, which we assume legislates in light of constitutional limitations. We applied this principle most recently in West Virginia Human Rights Comm'n v. Garretson, 196 W.Va. 118, 124, 468 S.E.2d 733, 739 (1996) ("[a]s in any case of statutory construction, we must interpret the law to avoid constitutional conflicts, if the language of the ... [statute] will reasonably permit such an avoidance" (Emphasis added)). However, this case is quite different. [Relocated footnote.]

[12]This is the first step regardless of whether the challenge is procedural or substantive. As should become clear below, we analyze the issue in this case as one of substantive due process, which places us in agreement (on this point) with the plurality opinion in Michael H. v. Gerald D., 491 U.S. 110 (1989), which is discussed in the text, infra. An argument can be made that this is a case of procedural due process, Michael H., 491 U.S. at 136 (Brennan, J., dissenting), i.e., that the statutory refusal to allow the putative father an opportunity to prove his claim and vindicate his rights as a father is a failure of process. The validity of that refusal, however, necessarily turns on the sufficiency of the State's justification

interest in maintaining a relationship with a child who was born while the child's mother was married to another man. A longstanding line of cases at the federal level and in West Virginia, as well as in other state courts, recognizes that "liberty" within the meaning of the Due Process Clause embraces the rights of parenthood,[13] and that umbrella includes a parent's right to establish and preserve relationships with his or her children, even if they are born outside the traditional family. E.g., Lehr v. Robertson, 463 U.S. 248 (1983); Stanley v. Illinois, 405 U.S. 645 (1972); McGuire v. Farley, 179 W.Va. 480, 370 S.E.2d 136 (1988); J.M.S. v. H.A., 161 W.Va. 433, 242 S.E.2d 696 (1978).

This case does add a new element. Prior decisions deal either with the parenting rights of some legally recognized relative or with the rights of natural fathers of children born to unmarried women. Here the child in question was born into the mother's marriage with another man and thus, under the common law, is presumed to be the legitimate child of the marital couple. See, e.g., McGuire v. Farley, supra. We are well aware that the United States Supreme Court in Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion), upheld a California law that precluded a putative father from establishing paternity over a child born into another man's marriage. We decline to follow Michael H. v. Gerald D., supra, however, in construing our own Due Process Clause. We do so for two reasons. First, the split on the Michael H. v. Gerald D. Court weakened the case's precedential authority. The central holding of the plurality--that the putative father did not have an affected liberty interest-- was joined in by only four justices. Four other justices expressly disagreed and insisted the putative father had a liberty interest in his relationship with the child in question. A fifth, Justice Stevens, cast the decisive vote, while concurring only in the judgment; he assumed the father could have a protected liberty interest in the child, even though the "mother was married to, and cohabiting with, another man at the time of the child's conception and birth." 491 U.S. at 133, 109 S.Ct. at 2347, 105 L.Ed.2d at 112 (Stevens, J., concurring in the judgment).[14] Thus, even as a matter of federal constitutional law, Michael H. v. Gerald D., supra, does not preclude recognition of a liberty interest in this case.

Second, and more substantively, we find reason to interpret our own Due Process Clause in Section 10 of Article III of the West Virginia Constitution to encompass the liberty interest claimed by Thomas. In our view, the federal and state decisions cited above regarding the liberty interests of fathers of illegitimate children were not premised, as the Michael H. v. Gerald D. plurality insists, on the maintenance of rights within the traditional family unit. . . . Rather, they focus on the personal stakes of fathers in their relationships with their children, regardless of whether the setting is traditional. E.g., Lehr v. Robertson, supra; Stanley v. Illinois, supra. As the Court said in Stanley, "the law [has not] refused to recognize ... family relationships unlegitimized by a marriage ceremony.... 'To say that the test of ... [constitutionality] should be the "legal" rather than the biological relationship is to avoid the issue. For the ... [Constitution] necessarily limits the authority

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for making it. Put another way, the State in this case is not attempting to invoke its powers to terminate a liberty interest based upon some evidentiary standard, see, e.g., Ingraham v. Wright, 430 U.S. 651 (1977); Major v. DeFrench, 169 W.Va. 241, 286 S.E.2d 688 (1982); rather, the State is refusing to extend the liberty to an entire class of individuals. And the validity of that refusal "must ultimately be analyzed as calling into question not the adequacy of procedures but ... the adequacy of the 'fit' between the classification and the policy that the classification serves." Michael H. v. Gerald D., 491 U.S. at 121 (Plurality opinion; citations and some text omitted). We perceive that to be an assessment that is more accurately characterized as "substantive" rather than "procedural". The bottom line may be, however, that it does not really matter which handle one attaches.

[13]E.g., Lehr v. Robertson, 463 U.S. 248 (1983); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)[.]

[14]Justice Stevens concurred on the basis of his reading of the California statute, which, he said, adequately provided for the putative father's liberty interest.

of a State to draw such "legal" lines as it chooses.' " . . . See also Moore v. City of East Cleveland, 431 U.S. 494 (1977) (grandmother had substantive due process interest in maintaining unitary household that included extended family). In our opinion, the strength of a parent's bond with his or her child is not dependent upon some official or traditional arrangement; rather, the strength derives from the parent's personal and emotional investment and the relationship that develops from that investment. The "liberty" of the Due Process Clause is grounded in protecting those concerns, such as parenting, that are vital to an individual's self-fulfillment and not in preserving formalities. See also W. Va. Const. Art. III, § 1 ("[a]ll men ... have certain inherent rights, of which, ... they cannot ... deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means ... of pursuing and obtaining happiness and safety"); Women's Health Center v. Panepinto, 191 W.Va. 436, 446 S.E.2d 658 (1993).[16]

We are, therefore, in obvious disagreement with Justice Scalia's contention, which was joined in by only one other justice, that liberty interests should be defined only at the most specific level of our society's traditions. See Michael H. v. Gerald D., 491 U.S. at 127-28 n. 6. Such a reading runs contrary to the holdings of many cases,[17] fails to accord proper respect to diversity and individualism, and pretty much protects only those liberties that rarely need judicial protection. We recognize Justice Scalia's argument that his reading minimizes judicial intervention into political choices. We are not convinced, however, that confining liberty to the most specific level of a tradition will either effectively limit judicial discretion (what "traditions" qualify and what is their most specific level are questions that do not produce self-evident answers) or achieve just results.

We do agree with Justice Scalia that courts must proceed with the greatest caution when identifying and defining non-enumerated constitutional rights. Moreover, we confess there is no magic formula to guide us in that undertaking. Unless we are ready to hold that the "liberty" in Section 10 of Article III refers only to freedom from bodily restraint – a position that this Court has never held and that is contrary to the uniform interpretation of the Due Process Clauses in the United States Constitution and other state constitutions[18] – then we are forced onto the slippery path of identifying and defining non-enumerated rights. We undertake such steps ever mindful of our limitations and responsibilities as judges and of the instructive words of Justice Harlan:

> "Judicial self-restraint will ... be brought about in the 'due process' area ... only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrine[ ] of ... separation of powers ha[s] played in establishing and preserving American freedoms." Griswold v. Connecticut, 381 U.S. 479, 501 (1965). (Harlan, J., concurring).

In this case, however, our task is not really so difficult because we read our precedents as recognizing that a father has a liberty interest in maintaining an established parent-child relationship, regardless of whether the relationship is within traditional and official parameters. E.g., McGuire, supra; J.M.S., supra. We do not believe the added fact that the child was born while the mother was married to another man necessarily precludes the maturation of the biological father's liberty

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[16]Of course, the preservation of marriage as an institution and its role in a lawful society is vital to our public interest and policy. In disputed paternity actions, such as this one, we merely state that an existing marriage is but one factor, albeit important, in the consideration of granting standing to a putative father to challenge paternity

[17]E.g., Carey v. Population Services, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973), modified by Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[18]We also would have to concede that the guarantee of the "enjoyment of life and liberty, with the means of ... pursuing and obtaining happiness and safety" found in Section 1 of Article III of the West Virginia Constitution is completely unenforceable. This concession would be contrary to our conclusion in Panepinto, supra. Because the parties have not invoked that provision, however, we do not consider its impact on this case.

interest. Depending on the circumstances, the biological father could still make the personal and emotional investments and develop the same relationship that we have found to be protected in our prior cases. Accordingly, we hold that, where a biological father has made a "substantial" personal investment in his relationship with his child, he acquires a liberty interest in maintaining that relationship.

What the added fact of the pre-existing marriage does, however, is alter the nature and weight of the State's interests. Merely identifying that a law affects an individual liberty is not the end of the matter; our doctrines permit the State to intrude upon liberties protected by the Due Process Clause when reasonably necessary to accomplish a goal of countervailing importance.[20] Historically, the justifications for precluding litigation over the paternity of a child born into wedlock were to prevent illegitimizing the child and avoiding court battles over a divisive matter that is not easily subject to proof. As demonstrated below, however, societal enlightenment and scientific advances largely have eviscerated those interests.

In the past, the legal system did not protect the rights of an illegitimate child in the same fashion as a legitimate child. The harsh reality was that illegitimate children often had to rely on the government to care for their needs because there were no remedies at common law to compel a putative biological father to care for any illegitimate children he may have sired. . . . "At common law, an illegitimate child was considered to be filius nullius, or child of no one." . . . In addition, illegitimate children did not enjoy the same inheritance rights as those who were legitimate. Social stigmatization of "bastards" further contributed to the unfortunate plight of illegitimate children. These legal and social disabilities led to the presumption that a child born during a valid marriage was presumed a child of the marriage. It was a strong presumption and could be overcome only by proof that the husband did not have access to his wife during the time of conception or that he was impotent. See Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989).

In recent decades, however, both the law and social attitudes have changed and have largely eliminated the pre-existing discrimination. Over time, legislatures created statutory provisions to assist in determining paternity. The goal behind such paternity proceedings was "to prevent the child from becoming a public charge, and to compel the father to maintain and support it for such period as may be fixed by the court." Holmes v. Clegg, 131 W.Va. [449], 451, 48 S.E.2d [438], 440. . . . Moreover, court decisions applying equal protection doctrines have denounced treating illegitimate children differently from those born during a marriage.[22] The common law has evolved, too. Although Michael K.T. v. Tina L.T., supra, repeated the presumption of legitimacy is "one of the strongest at law," the case limited the presumption by adding the use of blood tests to the common law grounds of impotence and nonaccessibility as bases for excluding paternity. We justified the result by recognizing that the impact of societal changes requires the presumption to give way at times:

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[20]We, therefore, agree with Justice Brennan's dissent in Michael H., 491 U.S. at 136, that the concerns articulated in the plurality about the value of preserving traditional family units and their integrity should not be relied on in refusing to recognize the existence of a liberty interest but are more properly considered in assessing whether the State has a sufficiently important interest to justify imposing a limitation on that liberty. After all, even the most unquestionably accepted liberties--e.g., freedom from bodily restraint, freedom of speech--are subject to limitation when necessary to accomplish a compelling governmental goal.

[22]See Gomez v. Perez, 409 U.S. 535 (1973) (illegitimate and legitimate children must be treated the same for purposes of child support from the father); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (illegitimate children permitted recovery under worker's compensation laws); Levy v. Louisiana, 391 U.S. 68 (1968) (Louisiana statute unconstitutional because it denied illegitimate children the right to recover for the wrongful death of mother); Shelby J.S. v. George L.H., 181 W.Va. 154, 381 S.E.2d 269 (1989) (ten-year statute of limitations for filing paternity action invalidated); State ex rel. S.M.B. v. D.A.P., 168 W.Va. 455, 284 S.E.2d 912 (1981) (three-year statute of limitations for filing paternity action for illegitimate children invalidated).

"The almost universal position that blood tests are admissible evidence regarding the issue of nonpaternity is due to a combination of several factors.... The first and major reason is the increased scientific reliability of blood test results. The second reason is that the historical basis for the presumption of legitimacy was society's desire to protect children from the stigma of illegitimacy as well as to prevent illegitimate children from becoming wards of the state.... These two historical bases for opposing bastardization have been significantly vitiated given the modernization of society and legislation drafted to address the problems of bastardization. Specifically, it has been recognized that the stigma of illegitimacy is diminishing in the wake of a society which is composed of so many nontraditional households (e.g. [sic] single parents, step-parents, etc.). See 2 L. Wardle, C. Blakesley, J. Parker, Contemporary Family Law: Principles, Policy and Practice, § 9:01 at 3 (1988). Moreover, most states have statutes similar to W. Va.Code §§ 48A-6-1 to 48A-6-6 (Supp.1989), pursuant to which paternity can be established and awards of child support and maintenance made, thereby removing the financial burden of bastardization placed on the state." [Michael K.T.] . . .

For the above reasons, we conclude that the historical rationales for preventing a putative biological father from claiming paternity over a child born to another's wife can no longer sustain the intrusion on the biological father's liberty interest.

An additional governmental interest, however, does have considerable validity in this context. Clearly, the government has a substantial interest in preserving the integrity of traditional family units and in discouraging vexatious or even good-faith suits that have a high likelihood of disrupting family life and possibly causing confusion and emotional harm to affected children. Not all petitions challenging the paternity of marital children threaten those interests, however. In the present facts, for example, the marriage into which Jennifer was born long since has been dissolved, so Thomas's suit could hardly damage its stability or integrity.

Still, we believe governmental interests in preserving family units and their integrity warrant some measures designed to limit suits to establish paternity over marital children that would not be justified in cases involving nonmarital children. We conclude, however, that these legitimate goals cannot support the statute's complete exclusion of paternity suits by putative fathers of children born into someone else's marriage because less drastic measures are available that will fully meet the State's legitimate concerns.

First, the scope of the liberty itself limits the intrusion. We adopt Justice Brennan's synthesis of the relevant federal decisions[23] defining the liberty:

"[A]lthough an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so. 'When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," ... his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." ' " [Michael H. (Brennan, J., dissenting)]. . . .

Thus, with the possible exceptions noted below, a petition by a putative biological father seeking to establish his paternity over a child who was born while the mother was married to another man may not proceed unless the putative father clearly and convincingly proves as a threshold matter that he has established a substantial paternal relationship with the child. We agree with the rationale of the Massachusetts Supreme Judicial Court supporting this requirement:

"Without regard to the outcome of a paternity case, even the very trial of such a case might place great strain on a unitary family. Where, however, the plaintiff has exhibited that he has had a

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[23]Lehr v. Robertson, supra; Stanley v. Illinois, supra; Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

substantial parent-child relationship with the child, it will certainly come as no surprise to the marital family that there is a question as to paternity. If the plaintiff cannot come forward with clear and convincing evidence of such a relationship, he will not be able to proceed beyond the preliminary stages of the action. The family will be protected against significant intrusion. If, on the other hand, the putative father can demonstrate that he has enjoyed a substantial relationship with the child, then his interest warrants protection and the interest in protecting a family which, by necessary implication, has already suffered substantial interference (by the acts of one of the marital partners) is greatly decreased. In these circumstances, the putative father should be allowed to proceed with his action." [C.C. v. A.B.]

The putative father's showing need not be made, however, if no respondent (named or intervening and including the guardian ad litem) contests the petition. We leave for another day whether there should be an additional exception for cases in which the petitioner alleges and proves that he would share in the care of, responsibility for, and support of the child but for the mother's repudiation. . . .

Second, because a paternity action is in the nature of an equitable proceeding, as well as Rule 11 of the West Virginia Rules of Civil Procedure, a circuit court has discretion to impose attorney's fees on litigants who bring vexatious and groundless lawsuits. Appropriate exercise of that discretion should alleviate some of the concerns about the use of paternity actions for ulterior or vindictive purposes. In addition, the support obligations that could likely attend a finding of paternity will function as a built-in deterrent to nonserious paternity actions brought by putative fathers.

Finally, permitting a putative father to have standing does not end the matter. Even if he proves paternity, he still is not necessarily entitled to intrude further into the marital family (if it has survived) or into existing child-parent relationships, including any relationship that has developed between the presumed father and the child. These factors may be considered in both the standing and paternity determinations. They also may have an impact on other issues the circuit court must decide. A finding of paternity would only entitle the natural father to an opportunity to request to invoke his parental rights; in response, it would remain for the circuit court to determine issues of visitation, custody, etc., based on the best interests of the child. E.g., [Michael K.T.; J.M.S. v. H.A.] As Justice Workman stated for the Court in Michael K.T., and as we have often repeated, "the best interests of the child is the polar star by which decisions must be made which affect children." . . .[24]

In making any of the above determinations, it would be appropriate for the circuit court to consider the impact of its order on the existing family, if there be one, or the existence of already established parent-child relationships. If the putative father's intrusion into the family, or into an established parent-child relationship, would cause undue disruption and, thus, jeopardize the child's proper development, the court could consider that as a basis for denying relief. In the present case, although the family unit that existed at the time of Jennifer's birth is dissolved, it is still necessary for the circuit court upon remand to consider the existence and extent of any preexisting child-parent relationship between the presumed father and Jennifer. If such a relationship exists that would be a factor against according the putative father some access. These are all fact-specific cases, however, and require careful consideration of many issues, including the age of the child, his or her emotional maturity, the personalities of the affected individuals, their history, the wishes of the child, any prior opportunities to raise the issue of the paternity, and any other matter relevant to

[24]Permitting the putative father an opportunity to establish and assert his parental rights should not be construed in any way as an erosion of the child's right to continued association with the presumed father or others where a father-child relationship may have been established. In Syllabus Point 2 of Honaker v. Burnside, 182 W.Va. 448, 388 S.E.2d 322 (1989), we stated: "Although custody of a minor child should be with the natural parent absent proof of abandonment or some form of misconduct or neglect, the child may have a right to continued visitation rights with the stepparent or half-sibling." Thus, we expand the holding in Honaker to other parental relationships.

determining what is best for the child. . . .

Although we find that W. Va.Code, 48A-6-1, is, in part, unconstitutional, we recognize the importance of this statute. Therefore, rather than rendering the entire statute unenforceable, we apply the doctrine of the least intrusive remedy and hold that the Due Process Clause of the West Virginia Constitution requires courts to hear and decide, under the guidelines we set out below, paternity actions brought by a putative biological father of a child born to a married woman who is not his wife. . . .

C.

New Standing Requirements

Given our holding that putative biological fathers can acquire a liberty interest upon developing a substantial parental relationship with a child, regardless of the mother's marital status, we believe it is appropriate for us to provide the circuit courts with guidance as to how such cases should be processed. A balance must be struck between the interests of maintaining a family unit and/or an existing father-child relationship and the legitimate interests of a putative father. Thus, we find that, in the absence of special circumstances which would justify an exception, a putative biological father must prove by clear and convincing evidence the following factors before he will have standing to raise the issue of paternity of a child born to a married woman who is not his wife: (1) that he has developed a parent-child relationship with the child in question, and (2) that the child will not be harmed by allowing the paternity action to proceed.[25] In determining whether the child will endure harm by the paternity action, it is highly relevant for the circuit court to consider on remand whether the putative father was dilatory in grasping the opportunity to assert his parental rights and responsibilities. We cannot escape the fact that the putative father testified in the underlying divorce and custody action and did not indicate at any time that he, not Roy, was the natural father of Jennifer. Unless adequately explained, his silence weighs heavily against his interest in the present action. We also require that the child must be joined in the suit and a guardian ad litem appointed. In addition, the preeminent factor in deciding whether to grant or deny blood testing is the child's best interests. Accordingly, the standards set forth in Michael K.T., supra, apply here as well:

> "We hold that when a putative father seeks to use blood test results to ... [prove] his paternity and rebut the presumption of legitimacy which has attached to a child born of a valid marriage, an in camera hearing should be held in order for the circuit court to make a preliminary determination whether the equities surrounding the particular facts and circumstances of the case warrant admission of blood test results." . . .

We find these preconditions balance the interests of all the parties in question. Although a parent has a protectable interest in a child, a parent's rights are not absolute: "'"[T]he welfare of the child is the paramount consideration to which all of the factors, including common law preferential rights of the parents, must be deferred or subordinated."'" [Johnson v. Johnson, 120 N.C.App. 1, 13, 461 S.E.2d 369, 376 (1995).] . . . These limitations do not offend the Constitution. ...

III.

CONCLUSION

When a putative biological father raises a paternity claim, the circuit court must provide the petitioner with an opportunity to prove that he meets the threshold standards that will allow him to

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[25]Examples of factors that may be considered when conducting this two-step analysis include: (1) examining the child's current home environment, (2) the on-going family relationship, (3) the child's relationship with the putative father, (4) the child's knowledge and reaction to paternity proceedings, (5) the putative father's attempt to become involved in the child's life, (6) whether the putative father acquiesced in allowing another to establish a father-child relationship, (7) when the putative father discovered he might be the biological father, (8) whether there is an existing child-parent relationship with the presumed father, and (9) whether ascertaining genetic information might be important for medical treatment or genealogical history. This is not an exhaustive list of factors that could be relevant. What is ultimately to be considered should be left to the discretion of the circuit court.

proceed. The threshold determinations, as well as any ultimate allocations of the parental rights, must assess the best interests of the child. The two sets of decisions, which will typically involve overlapping evidence, obviously require the exercise of sensitivity and discretion in the analysis of a range of factors that can vary widely from case to case in terms of their applicability and importance. Accordingly, the circuit court's decisions will not be reversed absent an abuse of discretion. . . . We also direct that the child in question must be joined so that his or her rights may be adequately protected.

In so holding, we do not intend, in any way, to denigrate the importance of the traditional family unit or the institution of marriage. To the contrary, we continue to believe that the family provides the foundation upon which our society is built and through which its most cherished values are best transmitted. Our disposition of this case merely recognizes the reality that nontraditional living arrangements do exist, that recognized liberty interests can arise from such arrangements, and that furtherance of the State's interest in preserving family and marital stability does not require an absolute bar to the rights of putative natural fathers.

We, therefore, grant a writ of prohibition, as moulded, and remand this case to permit the paternity action to proceed only in a manner consistent with this opinion. . . .

NOTES

1. Parental Rights

The West Virginia Supreme Court since at least *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973), has recognized "that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." As stated by the Court in *Allyssha R. V. Nicholas R.*, 233 W. Va. 746, 760 S.E.2d 560 (2014), "The right of a parent to make decisions concerning the care, custody, and control of her children is among the most cherished fundamental liberty interests."

Shortly after *Willis*, the Court held that the State must afford indigent parents in abuse and neglect and termination of parental rights cases the right to State-provided counsel. *State ex rel. Lemaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974). According to that Court:

> Considering the complexity of charges potentially directed to allegedly neglectful parents, the sources available to the State as charging party, the potential for the State viewing the parents' defensive testimony as probative of criminal conduct and the fundamental nature of the parents' rights to the care, custody and companionship of their natural children, we are impelled to hold that a minimum standard of due process requires indigent parents faced with charges of neglect and the potential for termination of parental rights to natural children to be furnished with court-appointed counsel to represent their interest at State expense.

As a result, parents enjoy somewhat broader rights under the West Virginia Constitution than they do under the federal constitution. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (no due process right to appointed counsel unless trial court, on a case-by-case basis, determines that special circumstances exist such that a failure to appoint counsel would make the proceedings fundamentally unfair).

2. Parental Rights of Incarcerated Persons

While recognizing that incarcerated parents retain their fundamental parental rights, the Court has held that courts may in some cases proceed to decide abuse and neglect and parental termination issues in the absence of the incarcerated parent. Assuming proper notice, the trial court has discretion about whether to proceed taking into account a variety of factors, including whether the

parent requested to attend, the extent and effect of delays and their impact on the best interests of the child, the costs, and the existence of alternative measures (such as video participation) for protecting the parents' rights. *In re Tyler*, 213 W.Va. 725, 584 S.E.2d 581 (2003); *State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 529 S.E.2d 865 (2000).

3. Grandparent Visitation Rights

In 1998, the West Virginia Legislature enacted the Grandparent Visitation Act, which gives to grandparents the ability to request a court to order that they be permitted to visit with their grandchildren. The Act, now W. Va. Code 48-10-101, *et seq*., confers discretion on the trial court to make the decision and lists twelve specific and one catch-all criteria to consider, including "the preference of the parents with regard to the requested visitation." Subsequently, the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000), found that the application of a statute to confer extensive visitation rights to grandparents over the objection of the parents violated the latter's parental rights protected by due process. The statute in question stated, "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." The trial court had applied the statute without giving any (let alone sufficient) weight to the parents' objection to the visitation plan.

Similar issues reached the West Virginia Supreme Court in *State ex rel. Brandon v. Moats*, 209 W.Va. 752, 551 S.E.2d 674 (2001). In that case, a couple with a child divorced, and the mother received custody with visitation for the father. Eventually, the mother re-married and the father showed little interest in the child – but his parents did. The second husband then adopted the child, which terminated the natural father's rights, including his visitation rights. His parents thus invoked the Grandparent Visitation Act to get a court order allowing them to continue to see the child. The circuit court dismissed the case, ruling that the adoption deprived them of standing.

The Supreme Court reversed in an opinion for a three-justice majority written by Justice Albright. He first concluded that the biological grandparents did have standing under the Act and then turned to whether the statute was consistent with due process. The Act, he said, is constitutional:

> After comparing the provisions of our grandparent act with the flaws identified by the Court in *Troxel*, we conclude that the act, by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control of his/her children without undue interference from the state. [*Troxel*.] Our statutory scheme addresses almost every concern addressed by the Court in *Troxel* and many of those concerns are alleviated outright by the overarching standard that requires all visitation decisions to be reached by applying a two-prong standard of best interests and lack of substantial interference with the parent-child relationship. . . . Moreover, we are convinced that the Legislature both anticipated and provided for the proper consideration of the parent's liberty interest within the parameters of the *Troxel* ruling.

Justice Davis, joined by Justice Maynard, dissented, believing that the adoption cut off all the rights of the former grandparents as well as the former father.

4. Sibling Visitation

The West Virginia Supreme Court has twice upheld the right of a person to seek visitation with a minor sibling from whom he or she has been separated. *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003); *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989). In the more recent case, Lindsie was born in 1991 to Dennis and Debbie. In 1995, Dennis was killed in an accident at a construction site. Debbie subsequently struck up a relationship with Richard, and

that relationship produced Cassandra, who was born on May 23, 2000. Richard acknowledged paternity but did not live with Debbie and the girls. Lindsie and Cassandra then lived together as sisters until October 1, 2001, when Debbie died in an automobile accident. According to Debbie's will, Mary became Lindsie's guardian. Richard subsequently sought, and was awarded, custody of Cassandra. With that action, the girls were separated. Lindsie then sought visitation with Cassandra, which the circuit court denied, believing that there was no statutory or common law authority for the sought-for relief.

The Supreme Court unanimously reversed. Speaking through Justice Maynard, the Court found that *Honaker* had settled the threshold question of whether the circuit court had the authority to confer sibling visitation. The intervening decision in *Troxel*, however, raised some constitutional issues regarding the parent's rights. The Court concluded that they could be addressed and protected on a case-by-case basis by the trial court. Accordingly, a remand was in order:

> [W]e direct the Circuit Court of Grant County to hold a full evidentiary hearing on whether Lindsie should have regular visitation with her half-sibling. At this hearing, the circuit court, at a minimum, must take evidence and make rulings on several issues. First, the circuit court must hear and determine whether or not visitation with her half-sibling, Cassandra, is in the best interests of Lindsie. Second, the circuit court must also hear and determine whether such visitation is in the best interests of Cassandra, Lindsie's half-sister. In making this determination, there is a presumption that Richard W.S. is acting in the best interests of Cassandra. Therefore, if it is Richard W.S.'s position that visitation is not in the best interests of his daughter, the burden falls on Lindsie to rebut this presumption. Third, the circuit court must hear and determine whether or not an award of visitation will substantially interfere with the parent-child relationship and the fundamental rights of Cassandra's father, Richard W.S. . . .
>
> Moreover, in the circuit court's discretion, an order granting visitation to Lindsie with Cassandra may place such conditions on visitation that it finds are in the best interests of the children and that also reasonably accommodate the rights and preferences of Richard W.S. . . .
>
> Finally, we are confident that the limited right of sibling or half-sibling visitation recognized herein and in *Honaker* conforms to the United States Supreme Court's opinion in *Troxel.* First, our decision is limited to siblings or half-siblings only, and applies to no other third party relationships. Therefore, it is not overly broad. Second, we give due consideration to the fundamental liberty interests of parents and recognize the presumption that a parent acts in the best interests of his or her child.

5. Informational Privacy

In sustaining a circuit court's closure of a hearing and the court records in a case involving a public school's disciplining of a high school student, the Supreme Court stated:

> The right of privacy is a precious right which all Americans fiercely and jealously guard. It is also being dangerously eroded day by day. In an age when privacy rights generally are under attack and intrusiveness is facilitated by technological advances of both business and government, we are loathe to allow one of the last bastions of privacy, juvenile confidentiality, to be diminished in the least bit. We hold, therefore, that this state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings.

Garden State Newspapers, Inc. v. Hoke, 205 W.Va. 611, 520 S.E.2d 186 (1999).

6. Requirements for Standards

Without fully developing the concept, the Court held in *State ex rel. Berry v. McBride*, 218 W. Va. 579, 625 S.E.2d 341 (2005), that, in meting out at least some benefits, the government must create and abide by articulated standards. The case involved decisions at a state prison as to which

prisoners were to be double-bunked and for how long. (The rooms were not designed for double-bunking.) The Court held that "the constitutional principles of equal protection and due process of law, W. Va. Const. Art 3, § 10, require that decisions regarding whether an inmate in a State correctional facility should be housed in a single cell must be made pursuant to enforceable standards, policies, and procedures that are based on pertinent medical and other relevant criteria."

The Court also iterated "the basic notion of due process of law that a governmental agency must abide by its own stated procedures even though it is under no constitutional obligation to provide the procedures in the first place and even though it can change the procedures at any time; so long as the procedures are in place, the agency must follow them." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 65, 459 S.E.2d 329, 342 (1995).

D. Equal Protection

ISRAEL v. W. VA. SECONDARY SCHOOLS ACTIVITIES COMMISSION,
182 W. Va. 454, 388 S.E.2d 480 (1989).

MILLER, Justice.

Erin Israel, by her next friend, Patricia Israel, appeals from a final order of the Circuit Court of Pleasants County, entered February 11, 1988, denying her request for a declaratory judgment, injunctive relief, and damages on the basis of alleged gender discrimination. On appeal, Ms. Israel asserts that she was discriminated against in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and its state counterpart, Article III, Section 17 of the West Virginia Constitution, as well as the Human Rights Act, W. Va. Code, 5-11-1, et seq. (1987). We have reviewed the record and find reversible error; therefore, we reverse the judgment of the Circuit Court of Pleasants County and remand the case for further proceedings consistent with this opinion.

Ms. Israel has a great deal of experience playing baseball. She began playing baseball at the age of six in the local park and recreation league where she learned the basic fundamentals of the game. At the age of nine, Ms. Israel progressed into the Little League system. Her Little League coach testified that Ms. Israel's skills were always above average. He stated that "she was very aggressive, understood the game, its concepts, and its technique. " While playing Little League, Ms. Israel was nominated for every all-star team. At the age of thirteen, she became the first female to ever play on a Pony League team in Pleasants County. When Ms. Israel was a freshman at St. Marys High School, and expressed a desire to play on the all-male baseball team, the high school baseball coach told her he had no objections to her playing for him and promised to give her a fair tryout. In February, 1984, Ms. Israel tried out for the all-male high school baseball team. She was prohibited from playing on the team because of a regulation promulgated by the Secondary Schools Activities Commission (SSAC).

The Board of Education of the County of Pleasants (Board) is a member of the SSAC. The SSAC is a nonprofit organization created by W. Va. Code, 18-2-25 (1967), which authorizes county boards of education to delegate their supervisory authority over interscholastic athletic events and band activities to the SSAC. It is not disputed that every county board of education in West Virginia has delegated this responsibility and authority to the SSAC. In the exercise of its delegated authority, the SSAC adopted Rule No. 3.9, which provides:

> "If a school maintains separate teams in the same or related sports (example: baseball or softball) for girls and boys during the school year, regardless of the sports season, girls may not participate on boys' teams and boys may not participate on girls' teams. However, should a school not maintain separate teams in the same or related sports for boys and girls, then boys and girls may participate on the same team except in contact sports such as football and wrestling."

Shortly after Ms. Israel tried out to play on the baseball team, she was informed by St. Marys' assistant principal that she was ineligible to play on the baseball team because St. Marys had a girls' softball team. The assistant principal explained that if the school allowed Ms. Israel to play baseball, it would be in violation of Rule 3.9 and would be barred from playing in state tournaments. After numerous futile efforts to have the rule changed through the internal mechanisms provided by the SSAC, Ms. Israel filed a complaint with the Human Rights Commission (Commission).

The Commission issued Ms. Israel a right-to-sue letter, and she filed this action against the SSAC and the Board on April 18, 1986, in the Circuit Court of Pleasants County. The circuit court exonerated the Board, finding that it had made a good-faith effort to have the SSAC change the rule and that if the Board had ignored Rule 3.9, it would have been subject to severe sanctions by the SSAC. Ms. Israel does not appeal this ruling. She does appeal the circuit court's decision that the SSAC rule was valid. . . .

II

EQUAL PROTECTION

Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. Reed v. Reed, 404 U.S. 71, 75 (1971). The claimed discrimination must be a product of state action as distinguished from a purely private activity. . . .

A.

Fourteenth Amendment Equal Protection

In analyzing gender-based discrimination, the United States Supreme Court has been willing to take into account actual differences between the sexes, including physical ones. In Michael M. v. Sonoma County, Superior Court, 450 U.S. 464, 469 (1981), the Court explained that it has "consistently upheld statutes where the gender-based discrimination is not invidious but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. " On the other hand, the court has disapproved classifications that reflect "archaic and overbroad generalizations. " Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

Under the United States Constitution, a gender-based discrimination is subject to a level of scrutiny somewhere between the traditional equal protection analysis and the highest level of scrutiny utilized for suspect classes. The intermediate level of scrutiny as applied to gender-based discrimination was stated in Craig v. Boren, 429 U.S. 190, 197 (1976): "Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand an equal protection challenge.

Under the middle-tier analysis for gender-based discrimination claims, courts have recognized that it is constitutionally permissible under certain circumstances for public schools to maintain separate sports teams for males and females so long as they are substantially equivalent.[5] This result has been justified by one or more of the following reasons: (1) there are physical and psychological differences between males and females; (2) the maintenance of separate teams promotes athletic opportunities for women; and, as a corollary to (2), (3) if there were not separate teams, men might dominate in certain sports.[6] . . .

While courts have recognized the concept of substantial equivalency in the area of interscholastic sports, this does not mean that mere superficial equivalency will be found constitutional under equal protection principles. We are not cited nor have we found a case precisely on point. Several courts

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[5]The most easily resolved gender discrimination sports violation under equal protection principles is in the area of noncontact sports where the school has a male team, but no female counterpart. Courts have held that prohibiting a female from trying out for a male team violates equal protection principles. . . .

[6]Several courts have upheld rules which prohibit males from trying out for a sport which is provided exclusively for females. These decisions have found that this practice is a permissible means of attempting to promote equality of opportunity for females in interscholastic sports and of redressing past discrimination. . . .

have held that Little League baseball teams must, under equal protection principles, permit female players to try out. . . . However, in these cases, there was not a comparable team for females.

From the record in this case, we find that the games of baseball and softball are not substantially equivalent. There is, of course, a superficial similarity between the games because both utilize a similar format. However, when the rules are analyzed, there is a substantial disparity in the equipment used and in the skill level required. The difference begins with the size of the ball and its delivery, and differences continue throughout. The softball is larger and must be thrown underhand, which forecloses the different types of pitching that can be accomplished in the overhand throw of a baseball.

There are ten players on the softball team and nine on a baseball team. The distance between the bases in softball is sixty feet, while in baseball it is ninety feet. The pitcher's mound is elevated in baseball and is not in softball. The distance from the pitcher's mound to home plate is sixty feet in baseball and only forty feet in softball. In baseball, a bat of forty-two inches is permitted, while in softball the maximum length is thirty-four inches.

Moreover, the skill level is much more demanding in baseball because the game is played at a more vigorous pace. There are more intangible rewards available if one can make the baseball team. For a skilled player, such as the record demonstrates Ms. Israel to be, it would be deeply frustrating to be told she could not try out for the baseball team, not because she did not possess the necessary skills, but only because she was female. The entire thrust of the equal protection doctrine is to avoid this type of artificial distinction based solely on gender.

We agree with the SSAC that by providing a softball team for females, it was promoting more athletic opportunities for females. However, this purpose does not satisfy the equal protection mandate requiring substantial equivalency. We do not believe that by permitting females to try out for the boys' baseball team, a mass exodus from the girls' softball team will result. There are obvious practical considerations that will forestall such a result. Gender does not provide an automatic admission to play on a boys' baseball team. The team is selected from those who apply and possess the requisite skill to make the team. What we deal with in this case is an opportunity to have a chance to try out for the team. Aside from the baseball-softball dichotomy, other athletic events ordinarily operate on the same rules such that the substantial equivalency issue would be unlikely to arise.

B

State Equal Protection

The argument is made that our gender-based equal protection standard is pegged at a higher level, i.e., the strict scrutiny standard, based on our holding in Syllabus Point 2 of Peters v. Narick, 165 W. Va. 622, 270 S.E.2d 760 (1980).[9] The issue in Peters involved a discriminatory statute that permitted wives, but not husbands to seek separate maintenance. W. Va. Code, 48-2-28 (1976). We recognized in Peters the gender-based classification test adopted in Craig v. Boren, supra, and found that the maintenance statute violated the Equal Protection Clause of the Fourteenth Amendment. By way of dictum, we then proceeded to discuss our state constitution's equal protection standard.

. . . [W]e have recognized that although the phrase "equal protection" is not found in our constitution, its principles are an integral part of our constitutional law. E.g., Robertson v. Goldman, 179 W.Va. 453, 369 S.E.2d 888 (1988); State ex rel. Longanacre v. Crabtree, 177 W. Va. 132, 350 S.E.2d 760 (1986); Peters v. Narick, supra; Thorne v. Roush, 164 W. Va. 165, 261 S.E.2d 72 (1979); State ex rel. Harris v. Calendine, 160 W. Va. 172, 233 S.E.2d 318 (1977); State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965); Linger v. Jennings, 143 W. Va. 57,

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[9]Syllabus Point 2 of Peters states:

"Gender-based classifications challenged as denying the right to equal protection guaranteed by Article III, Section 17 of the West Virginia Constitution are to be regarded as suspect, accorded the strictest possible judicial scrutiny, and are to be sustained only if the State can demonstrate a compelling interest to justify the classification."

99 S.E.2d 740 (1957). Our cases have not been uniform as to where this principle reposes in our constitution. We have identified several constitutional provisions as providing the source of our equal protection doctrine.[13]

The same problem exists in the Fifth Amendment to the United States Constitution, which also lacks an "equal protection clause." When addressing actions of the federal government, the United States Supreme Court has traditionally found that the concept of equal protection is embodied in the Due Process Clause of the Fifth Amendment. As stated in note 2 of Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975): "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. . . ."

In order to finally settle where our state's constitutional equal protection principle is located, we hold that it is a part of our Due Process Clause found in Article III, Section 10 of the West Virginia Constitution, and, thus, we confirm Syllabus Point 3 of Robertson v. Goldman, supra:

> "The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution."

We explained in [State ex rel. Longanacre v. Crabtree]that "we have obtained guidance from federal cases interpreting the equal protection mandate of the Fourteenth Amendment to the United States Constitution[.]" In dicta in Peters, we strayed from this principle and ended by relying on cases involving "race, alienage [and] national origin." . . . Classifications relating to race, alienage, or national origin have always been subject to strict judicial scrutiny, the most stringent test used in equal protection analysis. Another criticism leveled in Peters against the middle-tier gender standard for an equal protection analysis was that "we are unimpressed by the lineage of the middle-tier approach." . . . Whatever its lineage, it is clear almost ten years after Peters that the middle-tier standard is now firmly embedded in the federal law and has been adopted by several state courts.

For the foregoing reasons, we conclude that our dictum in Peters with regard to our state equal protection standard for gender-based discrimination should be modified. We adopt the analysis used by the United States Supreme Court and other state courts. We therefore hold that a gender-based classification challenged as denying equal protection under Article III, Section 10 of our constitution can be upheld only if the classification serves an important governmental objective and is substantially related to the achievement of that objective. To the extent that Syllabus Point 2 of Peters differs from this rule, it is modified. It is apparent that the two tests are substantially equivalent. For this reason, we do not view the new gender-based equal protection rule to provide any less protection.

We have previously discussed in Section II(A), supra, the equal protection standard under the federal constitution and found the SSAC rule to be unconstitutional. For these same reasons, Rule 3.9 also violates our state equal protection constitutional standard. . . .

NOTES

1. While upholding Charleston's late-night curfew for juveniles, *Sale v. Goldman*, 208 W.Va. 186, 539 S.E.2d 446 (2000) (*per curiam*), held that youth are not a suspect class and that laws disadvantaging minors need satisfy only the rational basis standard.

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[13]Robertson v. Goldman, supra (art. III, § 10, due process clause); State v. Memorial Gardens Dev. Corp., 143 W. Va. 182, 101 S.E.2d 425 (1957) (art. III, § 10, due process clause); State ex rel. Longanacre v. Crabtree, supra (art. VI, § 39, special laws prohibited); Peters v. Narick, supra (art. III, § 17, right to equal protection is guaranteed); Linger v. Jennings, supra (art. III, § 17, denial of justice and open courts).

2. *Citizens Bank of of Weston, Inc. v. City of Weston*, 209 W.Va. 145, 544 S.E.2d 72 (2001). In a case involving alleged discrimination against local banking institutions – hardly a class in need of special judicial protection – the Court rejected disparate impact theories of equal protection, *i.e.*, claims based on the fact that a law imposes a disproportionately heavy burden on a protected class. For example, a height requirement of five feet ten inches to qualify for state employment would adversely affect women. For a unanimous Court, Justice Albright wrote:

> [W]e hold that the principles of equal protection are not invoked solely because a law, properly enacted, has a disproportionate impact. Without proof of a discriminatory purpose underlying the law's enactment, a disproportionate impact on one classification will not on its own create a violation of this state's equal protection provision.

LEWIS v. CANAAN VALLEY RESORTS, INC.,
185 W.Va. 684, 408 S.E.2d 634 (1991).

McHUGH, Justice:

This certified question case is a facial challenge to the constitutionality of the West Virginia Skiing Responsibility Act, W.Va.Code, 20-3A-1 to 20-3A-8 [1984] ("the Act"). We conclude that the Act on its face is constitutional despite the claims that it denies equal protection or constitutes impermissible special legislation, or violates the so-called "certain remedy" provision of this state's Constitution.

I
TRIAL COURT PROCEEDINGS

The plaintiffs, Daniel Lewis and Sonja Lewis, husband and wife, timely brought this civil action in the Circuit Court of Tucker County ("the trial court") against the defendant, Canaan Valley Resorts, Inc. ("Canaan") for personal injuries sustained by Daniel Lewis, a novice skier, while he disembarked from a ski lift at Canaan in December, 1987, allegedly due to ice accumulation in the ski lift dismount area in question. Mrs. Lewis sued for loss of spousal consortium. The plaintiffs allege that Canaan was negligent by: (1) failing to maintain reasonably the surface and subsurface area around the ski lift; (2) failing to inform plaintiff Daniel Lewis about the use of the lift, during his instructional ski course for beginning skiers; (3) failing to warn plaintiff Daniel Lewis of the extremely icy conditions allegedly existing at the time in the ski lift dismount area in question; and (4) failing to have adequate staffing at the ski lift dismount area in question.

In its timely filed answer Canaan included the affirmative defense that the action was barred by the West Virginia Skiing Responsibility Act, W.Va.Code, 20-3A-1 to 20-3A-8 [1984] ("the Act"). Among other things, that Act imposes certain responsibilities exclusively upon ski lift ("aerial passenger tramway") passengers, including the duty not to "[e]nter the boarding area of or use any aerial passenger tramway without requesting and receiving instruction on its use from the ski area operator, unless the passenger has the ability to use it safely without instruction[.]" W.Va.Code, 20-3A-4(4) [1984]. Under W.Va.Code, 20-3A-6 [1984] a ski area operator is liable only for injuries caused by the failure to follow the ski area operator's duties set forth in W.Va.Code, 20-3A- 3 [1984]. Section 3(8) expressly absolves the ski area operator of any liability for any injury caused by certain ski area conditions, such as surface or subsurface snow or ice conditions.

The plaintiffs moved to strike the defense that the action was barred by the Act. The trial court eventually granted the motion to strike, based upon its conclusion that the Act was unconstitutional in that it violated: (1) equal protection principles (W.Va. Const. art. III, § 10; U.S. Const. amend. 14, § 1); (2) the so-called "open courts" provision (W.Va. Const. art. III, § 17); and the proscription against special legislation (W.Va. Const. art. VI, § 39).

The trial court subsequently certified questions to this Court, asking us to decide whether the Act violates the aforestated constitutional principles.

II
EQUAL PROTECTION AND SPECIAL LEGISLATION

W.Va.Code, 20-3A-1 [1984] states the legislature's findings and purpose for the Skiing Responsibility Act:

> The legislature finds that the sport of skiing is practiced by a large number of citizens of West Virginia and also attracts to West Virginia a large number of nonresidents, significantly contributing to the economy of West Virginia. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operator, it is the purpose of this article to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury and those risks which the skier expressly assumes for which there can be no recovery.

(emphasis added) A ski area operator's liability is limited to violations of certain statutory duties, as stated in W.Va.Code, 20-3A-6 [1984]:

> Any ski area operator shall be liable for injury, loss or damage cause[d] by failure to follow the duties set forth in section three of this article where the violation of duty is causally related to the injury, loss or damage suffered. A ski area operator shall not be liable for any injury, loss or damage caused by the negligence of any person who is not an agent or employee of such operator, nor shall a ski area operator be liable for any injury, loss or damage cause[d] by any object dropped, thrown or expelled by a passenger from an aerial passenger tramway. Every ski area operator shall carry public liability insurance in limits of no[t] less than one hundred thousand dollars per person, three hundred thousand dollars per occurrence and ten thousand dollars for property damage.

(emphasis added) The exclusive duties of a ski area operator are set forth in W.Va.Code, 20-3A-3 [1984].

The Act also places certain duties on "passengers" and "skiers" and, in sections 7 and 8, respectively, imposes liability on each of them for injury, loss or damage resulting from violation of their respective duties.

The plaintiffs argue that the Act on its face violates equal protection principles of the State and Federal Constitutions. The plaintiffs in their petition and brief filed with this Court concede that, for purposes of equal protection analysis, a suspect classification or a fundamental right is not involved because the right to recover damages is economically based. Invoking the traditional, "rational basis" equal protection analysis, the plaintiffs contend that the separate classification of ski area operators by this Act is unreasonably narrow; the plaintiffs claim the natural classification, instead, would be the operators of all inherently hazardous recreational activities which contribute significantly to the economy of this state. The plaintiffs also contend that, while protecting the economic stability of industries which contribute significantly to the state's economy may be a legitimate state objective, the means selected here to achieve that objective, namely, to immunize, for the most part, such industries from tort liability is not rationally related to that objective. The plaintiffs point to existing tort principles (assumption of the risk or comparative negligence, for example) and other existing principles outside the Act (such as rules of civil procedure and of lawyers' professional responsibility proscribing frivolous lawsuits) which, in their opinion, adequately protect such industries from tort liability.

Finally, the plaintiffs contend that the Act is overly broad on its face because it not only immunizes ski area operators from the inherent risks of the sport of skiing which are essentially impossible for the ski area operators to eliminate, but, as written, also allegedly immunizes ski area operators from liability for even their intentional torts concerning skiing area or aerial passenger

tramway conditions.[7]

Canaan, on the other hand, stresses that existing tort principles and other judicially created principles are not adequate because they do not insulate ski area operators from exposure to liability, and it is such exposure which results in the very expensive liability insurance premiums which cripple the skiing industry and its contribution to the state's economy. Citing judicial precedents elsewhere upholding similar skiing responsibility acts against equal protection challenges, Canaan argues that the Act's classification of ski area operators is reasonable; that the objective of the Act, to protect the economic stability of an industry contributing significantly to the state's economy, is a legitimate state purpose; and that the means selected to achieve that objective, that is, limiting ski area operators' liability to violations of certain statutory duties which cause injury, is rationally related to the objective, and, therefore, within the broad discretion of the legislature to select.

The generally applicable fundamental principle is that the powers of the legislature are almost plenary: "The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby." Syl. pt. 1, Foster v. Cooper, 155 W.Va. 619, 186 S.E.2d 837 (1972). Moreover, in light of the constitutionally required principle of the separation of powers among the judicial, legislative and executive branches of state government, W.Va. Const. art. V, § 1, courts ordinarily presume that legislation is constitutional, and the negation of legislative power must be shown clearly:

> 'In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W.Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, 183 W.Va. 544, 396 S.E.2d 725 (1990).

Accordingly, a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . . [See] State ex rel. Haden v. Calco Awning & Window Corp., 153 W.Va. 524, 170 S.E.2d 362 (1969), where the Court stated that a statute may be constitutional on its face but may be applied in an unconstitutional manner. However, courts will not declare a statute wholly invalid based upon the mere possibility of an unconstitutional application of the statute. ...

We now turn specifically to equal protection challenges to legislation. This Court, in syllabus point 2 of Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989), observed that "[e]qual protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity." Israel finally settled, in syllabus point 4, where this state's equal protection concepts, not expressly set forth in the State Constitution, are located implicitly: "West Virginia's constitutional equal protection principle is a

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[7]The plaintiffs give the following example. The Act on its face . . . allegedly would immunize the ski area operator from liability should the operator intentionally conceal with snow a huge boulder placed intentionally in a dangerous location on a slope or trail by the operator, and a skier, exercising due care, collides with the concealed boulder and is injured thereby.

part of the Due Process Clause found in Article III, Section 10 of the West Virginia Constitution." See also syl. pt. 3, Robertson v. Goldman, 179 W.Va. 453, 369 S.E.2d 888 (1988). The scope of our state equal protection concepts "is coextensive [with] or broader than that of the fourteenth amendment to the United States Constitution." Id. (in part).

There are three types of equal protection analysis. First, when a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive "strict scrutiny," that is, the legislative classification must be necessary to obtain a compelling state interest. Deeds v. Lindsey, 179 W.Va. 674, 677, 371 S.E.2d 602, 605 (1988). Second, a so-called intermediate level of protection is accorded certain legislative classifications, such as those which are gender-based, and the classifications must serve an important governmental objective and must be substantially related to the achievement of that objective. Syl. pt. 5, Israel. See also syl. pts. 3-4, Shelby J.S. v. George L.H., 181 W.Va. 154, 381 S.E.2d 269 (1989) (illegitimacy cases). As we expressed in Israel, however, this "middle-tier" equal protection analysis is "substantially equivalent" to the "strict scrutiny" test stated immediately above. . . .

Third, all other legislative classifications, including those which involve economic rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose. We recently reformulated this "rational basis" type of equal protection analysis in syllabus point 4 of Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991):

> "'Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause." Syllabus Point 7, [as modified,] Atchinson v. Erwin, [172] W.Va. [8], 302 S.E.2d 78 (1983).' Syllabus Point 4, as modified,Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W.Va. 538, 328 S.E.2d 144 (1984).

See also [Courtney v. State Department of Health, 182 W.Va. 465, 388 S.E.2d 491 (1989); Cimino v. Board of Education, 158 W.Va. 267, 210 S.E.2d 485, (1974)].

A corollary principle is that the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . .

[This Court] holds that the West Virginia Skiing Responsibility Act, W.Va.Code, 20-3A-1 to 20-3A-8 [1984], which immunizes ski area operators from tort liability for the inherent risks in the sport of skiing which are essentially impossible for the operators to eliminate, does not violate equal protection principles of article III, section 10 of the Constitution of West Virginia or of the fourteenth amendment to the Constitution of the United States. . . . "There is a legitimate state interest in protecting the ski industry from frivolous lawsuits and liability over which the operator has no control." . . .

We also note that the legislature has enacted similar legislation immunizing, for the most part, commercial whitewater outfitters and guides, W.Va.Code, 20- 3B-1 to 20-3B-5 [1987]; operators of certain equestrian activities, W.Va.Code, 20-4-1 to 20-4-7 [1990]; and landowners not charging the public for recreational use of their land, W.Va.Code, 19-25-1 to 19-25-6 [1965, 1986]. To the extent that these acts involve inherently hazardous recreational activities which contribute significantly to this state's economy, they undermine the plaintiffs' contention that the classification of ski area operators is unreasonably narrow. We do not, however, express an opinion at this time on whether each of these acts is valid for equal protection purposes.

Our holding in this case that the Act does not violate equal protection principles leads us to conclude that the Act similarly does not constitute special legislation in violation of art. VI, section

39 of the Constitution of West Virginia, see supra note 3. See [Shackleford v. Catlett, 161 W.Va. 568, 244 S.E.2d 327 (1978); Cimino v. Board of Education, 158 W.Va. 267, 210 S.E.2d 485 (1974).

[The Court's consideration of the statute's constitutionality under the Certain Remedies Clause is reprinted in Section F, below.]

WHITLOW V. BOARD OF EDUCATION OF KANAWHA COUNTY,
190 W.Va. 223, 438 S.E.2d 15 (1993).

MILLER, Justice:

In this appeal, we consider whether the general provision of W. Va. Code, 55-2-15 (1923),[2] for tolling the statute of limitations period for suits brought by persons under a disability, has been superseded by the more restrictive tolling provision in the West Virginia Governmental Tort Claims and Insurance Act (Act), W. Va. Code, 29-12A-6 (1986).[3] This latter section is applicable only to individuals suing political subdivisions. If we find that W. Va. Code, 29-12A-6, takes precedence over W. Va. Code, 55-2-15, we then must consider whether that statute violates our constitutional principle of equal protection.

The plaintiff was severely injured on September 17, 1987, when the bleachers at her junior high school collapsed. She was fifteen years old at the time of the accident. The plaintiff sued the Board of Education of Kanawha on March 28, 1991, over three and one-half years after the accident. The defendant board of education contended that the plaintiff's suit was time barred by virtue of W. Va. Code, 29-12A-6(b). The parties agree that the defendant board of education is a political subdivision under W. Va. Code, 29-12A-3(c), and is, therefore, entitled to the benefit of the Act. The plaintiff, however, sought to avail herself of the limitations found in W. Va. Code, 55-2-15. The [Circuit Court] concluded that the limitation period in W. Va. Code, 29-12A-6, was applicable to this case and that the suit was time barred. The plaintiff appeals.

I.

. . . We conclude that the tolling provisions in the special statute of limitations as to minors in W.Va.Code, 29-12A-6(b), takes precedence over the tolling provisions in the general statute of limitations found in W.Va.Code, 55-2-15. . . .

III.

A.

The defendant begins its constitutional discussion by reminding us that, in the past, we have upheld legislative enactments against constitutional assaults made upon equal protection and certain remedy grounds. See, e.g., Gibson v. West Va. Dep't of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991) (statute of repose in W.Va.Code, 55-2-6a); Lewis v. Canaan Valley Resorts, 185 W.Va. 684,

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[2]W.Va.Code, 55-2-15, states, in relevant part:

"If any person to whom the right accrues to bring any such personal action ... shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, ... except that it shall in no case be brought after twenty years from the time when the right accrues." [relocated footnote]

[3]W.Va.Code, 29-12A-6(a), has a general two-year statute of limitations for tort actions against political subdivisions subject to a discovery rule. In W.Va.Code, 29-12A-6(b), there is a proviso or exception to the general two-year limitation which states:

"An action against a political subdivision to recover damages for injury, death, or loss to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs, or prior to the minor's twelfth birthday, whichever provides the longer period." [relocated footnote]

408 S.E.2d 634 (1991) (West Virginia Skiing Responsibility Act, W.Va.Code, 20-3A-6); Robinson v. Charleston Area Medical Ctr., 186 W.Va. 720, 414 S.E.2d 877 (1991) (damage limitation for pain and suffering in West Virginia Medical Professional Liability Act, W.Va.Code, 55-7B-8). Moreover, the defendant cites cases where we have specifically affirmed certain portions of the Act against similar constitutional attacks. E.g., Randall v. City of Fairmont Police Dep't, 186 W.Va. 336, 412 S.E.2d 737 (1991) (qualified tort immunity provisions upheld in W.Va.Code, 29-12A- 5(b)). See also Pritchard v. Arvon, 186 W.Va. 445, 413 S.E.2d 100 (1991) (immunity of employees of a political subdivision under W.Va.Code, 29- 12A-5(b)); O'Dell v. Town of Gauley Bridge, 188 W.Va. 596, 425 S.E.2d 551 (1992) (workers' compensation immunity in W.Va.Code, 29-12A-5(a)(11)).

Notwithstanding the results in the foregoing cases, they cannot be read as sanctioning the constitutionality of the entire Act. We approached those cases on limited legal and factual bases, just as we approach the constitutional issue in this case.

B.

The equal protection standard applicable to this case is the rational basis test set out in Syllabus Point 2 of O'Dell v. Town of Gauley Bridge, supra:

> """Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution which is our equal protection clause.' Syllabus Point 7, [as modified,] Atchinson v. Erwin, [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., [174 W.Va. 538], 328 S.E.2d 144 (1984).' Syllabus Point 4, Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991)."

The defendant argues that there is a rational basis for classifying minors differently in actions governed by W.Va.Code, 29-12A-6, than in other tort actions where minors are treated similarly by virtue of the general savings statute, W.Va.Code, 55-2-15. The defendant points to the legislative purpose of W.Va.Code, 29-12A-1, et seq., as demonstrating the intent to limit the liability of political subdivisions in order to make the purchase of insurance more affordable to those entities and, thus, less costly for taxpayers.[9] Consequently, the defendant contends that the classification of minors enunciated in W.Va.Code, 29-12A-6, bears a rational relationship to a proper governmental purpose because it reduces the period of disability for minors, thus limiting the length of exposure to claims asserted by minors against a political subdivision.

The plaintiff, on the other hand, asserts that there is no rational basis for treating minors over ten differently than other minors, or for treating minors in actions against political subdivisions differently than minors in actions against other entities. Moreover, there is the obvious dichotomy of treatment of minors when compared to the treatment of those who suffer from insanity. This latter class of individuals still enjoy the broader tolling provisions of W.Va.Code, 55-2-15. . . .

In a related context, we have declared unconstitutional a statute that limited tort claims against municipalities unless written notice was filed with the municipality within a prescribed period of time after the injury. Our decision in Syllabus Points 1 and 2 of O'Neil v. City of Parkersburg, 160 W.Va. 694, 237 S.E.2d 504 (1977), was reached on both due process and equal protection grounds. We affirmed O'Neil's Syllabus Points 1 and 2 in LePon v. Tiano, 181 W.Va. 185, 381 S.E.2d 384

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[9]W.Va.Code, 29-12A-2, outlines the legislative findings and in relevant part states:

> "The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services."

(1989):

"1. 'A legislative act which arbitrarily establishes diverse treatment for the members of a natural class results in invidious discrimination and where such treatment or classification bears no reasonable relationship to the purpose of the act, such act violates the equal protection and due process clauses of our federal and state constitutions.' Syllabus Point 1, O'Neil v. City of Parkersburg, 160 W.Va. 694, 237 S.E.2d 504 (1977).

"2. 'The notice of claim provision provided for in W.Va.Code, 8-12-20, as enacted by the legislature in [1976], is violative of the equal protection and due process clauses of our state and federal constitutions and is unconstitutional.' Syllabus Point 2, as amended, O'Neil v. City of Parkersburg, 160 W.Va. 694, 237 S.E.2d 504 (1977)." . . .

As earlier noted, the rational basis advanced for W.Va.Code, 29-12A-6, was to limit potential litigation and, thereby, to assist political subdivisions in obtaining affordable insurance. However, the initial and obvious flaw in this reasoning is that minors have been selected for this disparate and more severe treatment more so than others who are within their same class under W.Va.Code, 55-2-15, i.e., the insane. This disparity alone is irrational and violates equal protection principles that demand that those situated in the same class receive equal treatment.

However, even if the insane were included within W.Va.Code, 29-12A-6, we would still hold, as have other courts, that there is no rational basis for such disparate treatment of minors. Carving suits by infants against political subdivisions out of the general statutory tolling provisions can hardly be thought to substantially diminish the number of suits filed.

The law has traditionally recognized that an infant lacks the mental capacity to act intelligently with regard to his legal rights. Thus, we have promulgated Rule 17(c) of the West Virginia Rules of Civil Procedure that sets out how a suit may be brought on behalf of an infant. This procedure is drawn from statutory counterparts found in W.Va.Code, 56-4-9 and -10 (1923).

The general tolling statute in W.Va.Code, 55-2-15, as well as other similar statutes, such as the tolling provision in suits involving land and bonds of fiduciaries, is designed to extend the tolling period so that the rights of infants may be protected. However, these statutes also recognize that those who should act to protect an infant's rights may neglect to do so in a timely fashion. Therefore, these statutes allow an infant, upon reaching majority, to still have the benefit of the applicable statute of limitations period.

We are unwilling to find a rational basis for the legislative reduction of the tolling period for minors in this case. Their rights to file suit are entrusted to a parent or guardian, who may also be a minor, or who may be ignorant or unconcerned, and who, by inaction, could cause the minor to lose the right to file a claim. To require a child of tender years to seek out another adult to vindicate the claim would, in the words of the Missouri Supreme Court in Strahler v. St. Luke's Hospital, supra, "ignore the realities of the family unit and the limitations of youth." 706 S.W.2d at 10.[16]

Thus, W.Va.Code, 29-12A-6, violates the Equal Protection Clause found in Section X of Article III of the West Virginia Constitution to the extent that it denies to minors the benefit of the statute of limitations provided in the general tolling statute, W.Va.Code, 55-2-15.

Based upon the foregoing, the order of the Circuit Court of Kanawha County is reversed, and this case is remanded for further proceedings.

NOTE ON EQUAL PROTECTION REVIEW OF WORKERS' COMPENSATION PROVISIONS

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[16]Although not before us in this case, we note that W.Va.Code, 55-7B- 4(b), contains a tolling provision for minors identical to W.Va.Code, 29-12A-6(b), in regard to medical malpractice claims. We need not address the constitutionality of that provision at this time. We note that other jurisdictions have addressed this type of malpractice statute of limitations for minors and have held it to violate equal protection principles. . . .

By the end of 1994, the West Virginia Workers' Compensation Fund was in serious financial trouble. The Fund faced a deficit in underfunded reserves that was estimated to be $1.2 billion. Although the causes of the deficit are multiple and complex, two developments were primarily responsible for the especially critical situation in West Virginia. Professor Emily Spieler explained them as follows:

> First, there has been a substantial decline [in West Virginia] in employment in certain industries with high rates of injuries and high wages, particularly coal mining, over the last 15 years. Displaced workers from these industries filed large numbers of claims for disabilities arising from their prior work. During critical years, the premium rates charged to those industries were far too low, resulting in inadequate revenue to the fund. With the decline in payroll in those industries, it is now impossible to fund the cost of those prior injuries with premiums collected from the same industry. . . .
>
> Secondly, the problem of industrial and mining decline was exacerbated by political manipulation of the programme, particularly an unjustifiable, and probably illegal, decision by the former Governor of West Virginia to reduce employers' premium rates below sound financial levels. Effective 1 July 1985, these rates were reduced by 30 per cent for every industry, against the advice of the consulting actuarial expert. ...
>
> As a result of this 1985 reduction, the premium rate paid by underground coal operations dropped from $20.42 to $12.92 per $100 of payroll. The rates were then frozen at that level until 1 January 1989. During this period, claims costs from the industry continued to rise while employment declined.
>
> . . . For the first time, the workers' compensation fund began to lose money on a cash, as well as an accrual, basis; that is, the revenue collected each year not only failed to fund the future costs of injuries which occurred in that year, but actually was less than the money that was paid out in that year.

Emily Spieler, *Social Welfare Policy in the Context of Economic Restructuring: Lessons from the West Virginia Workers' Compen-sation Programme*, 30 URBAN STUDIES 351, 357-58 (1993).

Although the administration under newly-elected Governor Caperton raised premium rates in the second half of 1989 and subsequently imposed modest increases, the revenues lost in the preceding four years under Governor Moore were not recovered. In addition to the problems generated by decline in revenue collections, changes in the law had, according to some critics, made West Virginia's too liberal and too generous in providing benefits.

In response to the crisis, the West Virginia Legislature enacted sweeping changes to the Workers' Compensation Act in a "reform" passed in whirlwind fashion during the 1995 session. The Act, known popularly (or unpopularly, depending on whom you asked) as "S.B. 250," soon found itself to be the subject of a constitutional challenge in a mandamus action filed in the Supreme Court.

In *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996), the Court declined to decide as premature several of the contentions raised by the petition. The decision did hold, however, that the Act's attempts to retroactively change the terms of benefits eligibility violated due process of law. (See the discussion in Section C, supra.) In addition, the Court confronted the most controversial of the prospective changes—the inclusion of a requirement that to be eligible to be considered for permanent, total disability ("PTD") benefits, a claimant had to have a fifty percent "whole body impairment." The petitioners maintained that the fifty percent requirement violated equal protection because it arbitrarily excluded from eligibility many workers (especially older and more poorly educated ones) who were completely unable to work but whose injuries did not reach the fifty percent threshold. The Court rejected the challenge. In addition to quoting the usual "rational basis/deference to the Legislature on economic matters" cases, the opinion by Justice McHugh explained the Court's conclusion:

> "[T]hree aspects of the new permanent total disability system are worthy of note. First, decisions

regarding permanent partial disability have traditionally been impairment-oriented. For example, W. Va.Code, 23-4-6(f) [1995] has contained a schedule of permanent partial disability benefits based solely upon the type of injury without regard to the claimant's personal factors. Under the statute, the loss of a foot is a thirty-five percent permanent partial disability whether the claimant is a ballet dancer or an accountant, and the loss of a hand is a fifty percent permanent partial disability whether the claimant is a concert pianist or a television anchor. Second, decisions regarding permanent partial disability may not be accomplished with scientific precision. Inevitably, there has always been a certain degree of uncertainty. For example, W. Va.Code, 23-4-6(f) [1995] designates a wide variety of percentages of permanent partial disability for the whole or partial amputation of different appendages, from sixty percent for the loss of an arm to two percent for the loss of one phalanx of any toe other than the great toe. Finally, although the 'threshold' for permanent total disability review has been modified, the ultimate decision regarding the 'award' of permanent total disability remains intact, that is, under W. Va.Code, 23-4-6(n)(2), 'a disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability.'

". . . In the exercise of our limited judicial function, we are unable to say that predicating consideration of a claimant's permanent total disability claim on a medical impairment of fifty percent is not rationally related to the legitimate governmental purpose of ensuring the financial integrity of the workers' compensation fund."

Five months later, however, in *State ex rel. Boan v. Richardson*, 196 W.Va. 545, 482 S.E.2d 545 (1996), the Court struck down a different provision that constricted workers' compensation benefits. Once again presented with a petition for mandamus under its original jurisdiction, the Court in *Boan* was asked to prevent enforcement of West Virginia Code 23-4-23(b), which reduced the amount of PTD benefits by one dollar for every two dollars received by a claimant in Social Security retirement benefits. As in Blankenship, the Court held that this was a case of "economic rights" and that therefore the question was "whether the classification is a rational one[.]"

The State advanced two governmental interests in support of the setoff: (1) "to help preserve the fiscal integrity of the Workers' Compensation Fund" and (2) "to pursue a public policy goal against a claimant receiving duplication of benefits for the same loss." As to the first goal, the Court, speaking through Justice Albright, cited *Blankenship* and concluded that "we are satisfied that W. Va. Code § 23-4-23 (1994) serves a legitimate governmental concern and is within the power of the Legislature if it does not otherwise offend a constitutional guarantee."

Justice Albright then turned to the second justification and assessed it as follows:

We cannot say that legislative goals of avoiding the duplication of benefits "for the same loss", or simply avoiding the duplication of benefits, are beyond the power of the Legislature. However, if the purpose of the legislation under discussion is to avoid the duplication of benefits, we must now examine whether the classification employed to achieve that goal is rational, based on social, economic, historic or geographic factors, and whether the classification bears a reasonable relationship to that goal. We perceive that the classification employed falls afoul of those tests in relation to the acknowledged proper governmental purpose asserted.

Permanent total disability awarded under workers' compensation is part of a comprehensive plan designed to rectify the results of an injury in the workplace. The payments to the claimants and other benefits are in lieu of such elements of damage in the common law tort system as lost wages, lost earning capacity, reimbursement of past and future medical expenses, past and present pain and suffering, emotional distress, and other factors. . . . The amount of permanent total disability benefits is determined under a statutory scheme that involves diverse factors, including the nature of the injury, the average wages of the claimant over a relatively short time, and the average wages earned in the State. . . .

Social security old age insurance benefits, on the other hand, are retirement benefits earned by continued employment in the work force and the attainment of the age of sixty-two or sixty-five or older. . . . Those benefits arise primarily from participation in the national workforce. Employers and employees contribute to the system, and the benefits are, in effect, additional compensation paid by insurance as a result of having worked some period of time at some average taxable salary, except as the payments reflect a return of the recipient's wage contributions to the system. . . . Those benefits are not designed or intended to compensate for a workplace injury or replace elements of damage that might be recovered in a common law action for a such an injury. While old age social security may well provide some level of income while one who has been injured at work is not working, it is paid as a result of work history and the attainment of the age-required age, not by reason of any injury. Old age social security also functions as a partial replacement of income foregone by reason of the fact that one has retired and is not working or is not working at the pace engaged in prior to retirement. . . .

The factors we have just enumerated, comparing workers' compensation benefits to old age social security benefits, generate substantial doubt that the classification of "old age social security recipient" is a rational one upon which to base a reduction of workers' compensation permanent total disability benefits and substantial doubt that the classification bears a reasonable relationship to the governmental purpose of avoiding a duplication of benefits, particularly a duplication of benefits for the particular loss sustained by one who is permanently disabled by reason of a workplace injury. Respondent argues that the classification is rational and reasonably related, because the workers' compensation system is a part of "an overall wage replacement system" of which, presumably, the respondent views social security old age benefits to be another part. . . .

Without question, workers' compensation benefits in part "replace" wages lost by reason of not working because of injury and is measured, at least in part, by past wages earned. However, social security old age benefits "replace" wages lost by reason of not working because of retirement. . . .

We conclude that our workers' compensation benefits for permanent total disability are more than simply a wage replacement system. While the amount of such payments is, in fact, based on the injured worker's past employment, the benefits are also defined and limited by additional factors such as the average wages in the State. The payments provided in permanent disability cases compensate for more than lost wages because, as we have pointed out, they stand in lieu of a myriad of damage elements recognized in the tort system that are not measurable by wages earned or the average wages in the State. Moreover, . . . the total denial of benefits based on the assumption that one eligible to receive old age social security benefits is fully compensated for his injury by some level of workers' compensation benefits, reduced by a portion of social security benefits, raises a genuine issue as to whether the workers' compensation scheme is an adequate substitute remedy for that which might be available in the tort system for such an injury, thus implicating the validity of the system as a substitute for access to the courts. . . .

We also find that there is no reasonable relationship between the benefits payable under workers' compensation, which the Legislature may properly seek to reduce to protect the fiscal integrity of the Workers' Compensation Fund, and an amount equal to one-half of the old age social security benefits of permanently and totally disabled workers. In other words, we do not find that the statute under discussion in fact avoids "duplication of benefits". . . .

Considering the social, economic, and historic factors underlying the adoption and administration of our Workers' Compensation Act, on the one hand, and the factors underlying old age social security on the other, we likewise fail to see how the permanent total disability payments awarded in this case can be considered duplicative of old age social security benefits. We ... find that the lack of any commonality of purpose saps W.Va.Code § 23-4-23 (1994) of rationality, assuming its purpose to be the avoidance of double-dipping or duplication of benefits. Our view is reinforced by the fact that the two programs under discussion compute benefits on entirely

different bases and compensate for entirely different eventualities, as we have detailed.

Moreover, while any reduction of benefits can be seen as reasonably related to a legitimate goal of preserving the fiscal integrity of the Workers' Compensation Fund, we conclude, for the same reasons, that the classification of "old age social security recipients" is not a reasonable one, where the purpose of such classification is to impose a reduction of permanent total disability benefits in pursuit of the goal of enhancing the fiscal integrity of the Workers' Compensation Fund. We also reach that conclusion because permanent total disability payments under workers' compensation, while measured in part by prior wages, are by definition intended to compensate for several factors other than lost wages, past, present, or future, and are not just "wage replacement" and thus are neither welfare benefits or benefits "attributable to advanced years".

Based on the foregoing, the Court concluded:

"[W]e hold that W.Va.Code § 23-4-23 (1994) violates Art. III, § 10 of the West Virginia State Constitution in that it fails to provide the equal protection of the Workers' Compensation Act to old age social security recipients who may have been, or may be, injured in their employment and are thereby permanently and totally disabled within the meaning of our Workers' Compensation Act. We conclude that the statute is defective in creating the classification of "old age social security recipient" and reducing benefits for those persons, that such classification, as here applied, bears no reasonable relationship to a proper governmental purpose of avoiding duplication of benefits, and that it results in all persons within the class of "old age social security recipients" not being treated equally."

Compare *Boan* with *State ex rel. Beirne v. Smith*, 214 S.E.2d 771, 591 S.E.2d 771 (2003), which upheld a 1995-enacted workers' compensation provision, W. Va. Code § 23-4-6(d), that provided for the payment of PTD benefits "until the claimant attains the age necessary to receive federal old age retirement benefits" under the Social Security Act. The question was whether terminating the benefits at that point satisfied rational basis analysis. The Court distinguished *Boan* and explained its result as follows:

What we glean from *Boan* is that permanent total disability benefits and social security retirement benefits are not the same. Therefore, the statute in that case was unconstitutional because its procedure (reducing permanent total disability benefits for those who received social security benefits) bore no reasonable relationship to its avowed purpose (avoidance of benefit duplication). In this case, the petitioners argue the same logic should apply to the statute at issue. The Commissioner argues that the statute at issue is not constitutionally defective like the one in *Boan*, first, because it has a different purpose, protecting the solvency of the fund, and second, because its procedure, cutting off every injured person who reaches retirement age, is reasonably related to this purpose. We are begrudgingly persuaded that this position is correct.

The new language casts a wide net, depriving all who won their permanent total disability claims after the effective date of the statute of all cash benefits upon reaching retirement age. Thus, unlike the statute in *Boan*, it makes no distinction between those receiving social security and those who are not; it simply cuts off cash payments to all affected recipients. And unlike the statute in *Boan*, it also bears a reasonable relationship to the avowed purpose; cutting off these beneficiaries as they reach retirement age will no doubt somewhat reduce the expenses of the fund, making it somewhat more solvent than it would otherwise be.

The Court used rational basis analysis to consider the validity of State Division of Personnel policies regarding the accrual of benefits by employees absent from work while on temporary total disability ("TTD") compared to those absent while on sick leave. Writing for the Court in *Canfield v. West Virginia Division of Corrections*, 217 W.Va. 340, 617 S.E.2d 887 (2005), Justice Davis found a rational basis in denying sick leave accrual and holiday pay to those on TTD while according them to those on sick leave. For each, the distinction served the State's legitimate desire to avoid paying double benefits. Regarding the sick leave, Justice Davis described the rationale:

An employee who elects to use sick leave for an illness or injury does accrue additional sick-leave

during the period of absence from work, however, that employee also depletes his or her accrued sick leave by the number of days he or she is absent from work. The depletion is on a day for day basis, while new days are accrued at a rate of 1.5 days per month. *See W. Va.* C.S.R. § 143-1-14.4(a). Thus, sick leave days are used up at a much faster rate than they are replaced.

To the contrary, an employee who is receiving Workers' Compensation TTD benefits does not deplete his or her sick leave during the time of his or her absence from work. Thus, allowing such an employee to earn additional days, when no days are being depleted, would effectively be duplicating benefits.

Since TTD beneficiaries receive a set amount in lieu of their wages or salary, paying them for holidays would also be double-dipping. That is not so for those on sick leave, who would be deprived of both sick leave and holiday pay if they were not given the latter. On the other hand, the State had no rationale for its policies that gave seniority and annual leave accrual to sick leave employees while denying the same to TTD employees.

See also Marcus v. Holley, 217 W.Va. 508, 617 S.E.2d 887 (2005), which rejected the argument that basing the amount PTD benefits on the injured workers' past earnings unconstitutionally discriminated against part-time workers. The statute did not distinguish between part-time and full-time workers; rather, part-time employees generally earned less – and therefore received less in PTD benefits – because they worked less.

NOTE

In *Foundation for Independent Living, Inc. v. Cabell-Huntington Board of Health*, 214 W.Va. 818, 591 S.E.2d 744 (2003), the Court held that an ordinance limiting smoking in enclosed commercial facilities did not violate equal protection by providing exceptions for bars and gaming facilities. The Court could "not say" that the classifications "ha[d] no rational basis in social, economic, historic or geographic factors," but it also did not say what the rational basis might be. Instead, it ventured that such factors likely "influenced the incremental manner by which the Boards have proposed to eventually eradicate tobacco smoking in all enclosed public places."

E. The Certain Remedies Clause

LEWIS v. CANAAN VALLEY
RESORTS, INC.,
185 W.Va. 684, 408 S.E.2d 634 (1991).

McHUGH, Justice:

[See Section D, above, for a description of the facts, issues, and circumstances of the case.]

III
CERTAIN REMEDY

The plaintiffs also argue that the Act violates the "certain remedy" portion of W.Va. Const. art. III, § 17[.][13]

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[13][Section 17 provides:

The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.]

This state constitutional provision has sometimes been called the "open courts" or "access-to-courts" provision. Consistent with the terminology which we utilized recently in Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991), we will refer in this opinion to this state constitutional provision as the "certain

This Court very recently traced the history of the certain remedy provision and surveyed the various judicial interpretations elsewhere of comparable state constitutional provisions. In syllabus point 6 of Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991), we distilled this general rule: "There is [ordinarily] a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated."[14]

While "[w]e decline to hold that the certain remedy provision ... has no meaning when it comes to legislative enactments[,]" Gibson, 185 W.Va. at 225, 406 S.E.2d at 451, a couple of fundamental points are to be considered in arriving at the proper scope of this state's constitutional provision. First, this provision itself states that the "remedy" constitutionally guaranteed "for an injury done" to protected interests is qualified by the words, "by due course of law[.]" . . . This language extends considerable latitude to the legislature. Second, under W.Va. Const. art. VIII, § 13, the general authority of the legislature to alter or repeal the common law is expressly recognized. Moreover, even though a statute involves a complete bar to, or a substantial impairment of, a civil action to collect damages for personal injuries or property damage in certain circumstances, "[t]he fact that there is court involvement does not alter the economic basis underlying the right to sue." [Gibson.] Thus, access to the courts is not a fundamental right in the sense that any limitation on that right requires "strict scrutiny" for purposes of the certain remedy provision. . . .

To give effect to the certain remedy provision, which recognizes the tension between the existing right of a person to a remedy for certain injuries, on the one hand, and, on the other hand, the legislature's power to alter or repeal that remedy by "due course of law [,]" this Court adopts the following two-part test, once it has been shown, pursuant to syllabus point 6 of Gibson, that the certain remedy provision "is implicated." When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose. . . . Cf. O'Neil v. City of Parkersburg, 160 W.Va. 694, 700-01, 237 S.E.2d 504, 508 (1977) (applying a "rational basis" test for equal protection analysis and suggesting same test under W.Va. Const. art. III, § 17 on "open courts"; protection of public coffers, by itself, however, without considering effect on tort victim, is not reasonable).

. . . In the present case the Act did not impair any vested rights of the plaintiffs because the Act was enacted prior to accrual of the plaintiffs' common-law cause of action. The Act does, however, severely limit the procedural remedies existing at the time the Act was enacted. The Act limits a

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remedy" provision. As we observed in Gibson, W.Va. Const. art. III, § 17 also contains a provision on the public's right to attend most judicial proceedings and a provision on the "sale" or delay of justice.

[14]If a suspect classification or a fundamental, constitutional right is involved, there is a presumption of unconstitutionality.

In Gibson, this Court applied the general rule of syllabus point 6 in upholding the validity, under the certain remedy provision, of a ten-year statute of repose for actions for injuries, wrongful death or damages arising out of the defective or unsafe condition of any improvement to real property. No vested right was involved because the statute had been enacted prior to accrual of the common-law cause of action in question in that case. No substantial impairment of existing procedural remedies occurred because the time period selected by the legislature was reasonable in light of empirical data indicating that nearly all actions for that type of injury had been brought within ten years in jurisdictions not having an applicable statute of repose.

ski area operator's duties to those set forth in W.Va.Code, 20-3A-3 [1984], . . . and absolves the operator from the common-law exposure to liability for the inherent risks in the sport of skiing which are essentially impossible for the operator to eliminate, such as the exceptions to the reasonable maintenance duty, including surface or subsurface snow or ice conditions, set forth in W.Va.Code, 20-3A-3(8) [1984][.] The certain remedy provision is, therefore, implicated.

The Act does not provide an alternative remedy for the repealed common-law cause of action for damages resulting from the inherent risks of skiing which the operator essentially cannot eliminate. However, the obvious purpose of the Act was to eliminate or to curtail a clear economic problem for ski area operators and, therefore, for the economy of the state, specifically, exposure to liability for the inherent risks of skiing which the operators essentially cannot eliminate. Finally, the repeal of the common-law cause of action for damages resulting from the inherent risks of skiing which the operator essentially cannot eliminate is a reasonable method of achieving the purpose of the Act. . . . In this regard it is significant that skiers have the lowest rate of recovery among all personal-injury sports litigants who go to trial. Specifically, only twenty-three percent of ski accident cases which were submitted to juries between 1982 and 1989 resulted in verdicts for the plaintiffs. . . . Jurors seem to be saying that skiers fully assume the risk inherent in the sport. [The] Act codifies this prevailing common-law result but also removes the expensive exposure to liability. Therefore, as in Gibson v. West Virginia Department of Highways, the legislation is reasonable in terms of empirical data indicating that the legislation essentially codifies the general results under the common law.

This Court consequently holds that [the Skiing Responsibility Act] does not violate the certain remedy provision[.] ...

F. Property Rights

Read Article III, §§ 4, 9, & 10.

1. Contracts Clause

SHELL V. METROPOLITAN LIFE INSURANCE CO.,
181 W.Va. 16, 380 S.E.2d 183 (1989).

MILLER, Justice.

The circuit court, having found constitutional the provisions of W.Va.Code, 33-12A-1, et seq. (1984), prohibiting an insurance company from discharging its agents except for "good cause" as defined in the statute, has certified this question to us. We find these provisions to be an unconstitutional impairment of existing contractual obligations under Article I, Section 10, Clause 1 of the United States Constitution and Article III, Section 4 of the West Virginia Constitution.

The material facts of this case are essentially undisputed. On or about September 30, 1968, Bobby J. Shell was hired by Metropolitan Life Insurance Company (Metropolitan) as an insurance agent. His employment contract provided that he could be dismissed by Metropolitan "without advance notice for breach of any of the conditions of your appointment and also at any time by two weeks' notice in writing[.]"

In March, 1984, the Legislature enacted W.Va.Code, 33-12A-1, et seq., governing contractual relationships between insurance companies and agents. W.Va.Code, 33-12A-3, provides:

> "No insurance company may cancel, refuse to renew or otherwise terminate a written contractual relationship with any insurance agent who has been employed or appointed pursuant to that written contract by such insurance company for a period of more than five years, except for 'good cause,' as prescribed herein. If an insurance company proposes to cancel, fail to renew or otherwise

terminate a contractual relationship with the agent, the company shall so notify the agent by certified mail at least ninety days prior to the date upon which the company proposed to cancel, fail to renew or terminate the contractual relationship. Such notice shall include a statement of the grounds upon which the insurance company bases its decision to cancel, refuse to renew or terminate any contractual relationship.

"The following matters are 'good cause' for an insurance company to terminate the contractual relationship with its agent:

"(a) Criminal misconduct or gross negligence relating to the business or premises of the insurance agency;

"(b) Fraud or moral turpitude;

"(c) Abandonment or unattendance of the business or premises of the insurance agency for such period of time as may unreasonably interfere with the transacting of business;

"(d) The failure by the agent to pay moneys over to the company for insurance contracts sold by the agency;

"(e) The death or disability of the agent; and

"(f) Upon the company becoming insolvent or discontinuing any line of insurance for any business purpose: Provided, That the insurance commissioner shall notify or cause to be notified in writing all agents of such insolvent insurance company that they are no longer entitled to any benefit under their contract with the insolvent company."

In March, 1985, some nine months after the effective date of the statute, Metropolitan issued a new Manual of Instructions for Agents which, in essence, restated the "at will" nature of Mr. Shell's employment.

On or about June 12, 1987, Mr. Shell was fired, ostensibly for unsatisfactory work performance, with two weeks' salary in lieu of notice. Mr. Shell subsequently filed suit against Metropolitan in the Circuit Court of Logan County, alleging that he had been wrongfully discharged from his employment in violation of W.Va.Code, 33-12A-1, et seq. In response to a motion for summary judgment, Metropolitan asserted that the statute unlawfully impaired the obligations of the parties under the employment contract and was, therefore, unconstitutional. Metropolitan sought summary judgment on this ground or, in the alternative, certification of the question to this Court. Mr. Shell subsequently joined in the motion to certify the question, and, by order dated July 12, 1988, the circuit court granted the motion.

The principal issue before this Court is whether W.Va.Code, 33-12A-1, et seq., violates the Contract Clauses of the state and federal constitutions. In construing our state constitutional provision prohibiting any "law impairing the obligation of a contract," W.Va. Const. art. III, § 4, we have generally accepted the United States Supreme Court's interpretation of the similar provision contained in Article I, Section 10, Clause 1 of the United States Constitution. . . .

Initially, Mr. Shell contends that the Contract Clause analysis has no application here because his employment contract was modified by the new agents' manual issued in March, 1985. Mr. Shell argues that he was, in essence, given a new employment contract after the effective date of W.Va.Code, 33-12A-1, et seq., and that the statute therefore impairs no preexisting obligations.

In Syllabus Point 1, in part, of Devon Corp. v. Miller, 167 W.Va. 362, 280 S.E.2d 108 (1981), cert. denied, 455 U.S. 993 (1982), we recognized the general rule that the constitutional prohibitions against impairment of contractual obligations are not applicable to contracts formed after the effective date of the statute:

"The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract."

This rule was drawn from Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922), and Oshkosh Waterworks Co. v. City of Oshkosh, 187 U.S. 437 (1903), but is supported in a number of other cases. . . . The rationale for this rule is apparent: There can be no impairment of contractual

obligations which did not exist at the time the challenged statute was enacted. Thus, the Contract Clause prohibits only those statutes which impair existing contracts.

We must agree with Metropolitan, however, that Mr. Shell's employment contract predated the enactment of W.Va.Code, 33-12A-1, et seq. Nothing in the March, 1985 amendments to the agents' manual modified the provisions of the 1968 contract concerning the "at will" nature of Mr. Shell's employment. In fact, the new agents' manual expressly acknowledged Metropolitan's right to terminate Mr. Shell's employment for any reason on proper notice. We cannot conclude that Metropolitan, in essence, executed a new contract with Mr. Shell after the passage of W.Va.Code, 33-12A-1, et seq. Accordingly, we turn to the issue of whether the statute unconstitutionally impaired the parties' preexisting contractual rights.

In Orr v. County Comm'n of Cabell County, 178 W.Va. at 278, 359 S.E.2d at 111, we quoted with approval the following language from Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983):

> "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)."

We expressed a similar thought in Security Nat'l Bank & Trust Co., 166 W.Va. at 780, 277 S.E.2d at 616, where we said that "[s]tates can preserve community order, health, safety, morals and economic well-being, even though contracts are affected."

On the other hand, the Supreme Court has also noted "the high value the Framers placed on the protection of private contracts," and held that "[i]f the Contract Clause is to retain any meaning at all, ... it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). . . . Thus, the application of the Contract Clause generally involves a balancing of competing public and private interests.

In Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra, the Supreme Court enunciated a three-step test for balancing these interests. As we recognized in Security Nat'l Bank & Trust Co., 166 W.Va. at 780, 277 S.E.2d at 616, the initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. [Energy Reserves Group]. See [Allied Structural Steel]; United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). If a substantial impairment is shown, the second step of the test is to determine whether there is "a significant and legitimate public purpose behind the regulation, [United States Trust Co.], such as the remedying of a broad and general social or economic problem. [Allied Structural Steel; Energy Reserves Group]. Finally, if a legitimate public purpose is demonstrated, the court must determine "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' [United States Trust Co.; Energy Reserves Group].

Our initial inquiry, therefore, is whether W.Va.Code, 33-12A-1, et seq., impairs the existing contractual obligations of the parties. In [Allied Structural Steel Co.], the Supreme Court stated:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." . . .
>
> In [Energy Reserves], the Court further noted:
>
> "Total destruction of contractual expectations is not necessary for a finding of substantial impairment. [United States Trust Co.]. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. . . ."

Under the employment contract here, Metropolitan had the unilateral right to discharge agents at will upon two weeks' notice. Clearly, by requiring insurance companies to show "good cause" for

the dismissal of agents, W.Va.Code, 33-12A-3, severely limits the circumstances in which Metropolitan could discharge employees.

Moreover, W.Va.Code, 33-12A-5, provides the agent with a private cause of action for termination of his employment or nonrenewal of his contract for other than the "good cause" specified in the statute. This places an additional burden on Metropolitan that did not exist in the employment contract and subjects Metropolitan to the prospect of costly and disruptive legal challenges even where dismissal is proper under the statute. The statutory imposition of these additional burdens appears to us to constitute a substantial impairment of the parties' existing contractual obligations. . . .

Mr. Shell, however, argues that the impairment is minimal in view of the considerable regulation of the insurance industry in this state. W.Va.Code, 33-1-1, et seq. It is recognized that one of the factors to be considered in determining the degree of impairment is whether the industry the statute seeks to regulate has been regulated in the past. Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra; Allied Structural Steel Co. v. Spannaus, supra; Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32(1940); Security Nat'l Bank & Trust Co. v. First W.Va. Bancorp, Inc., supra. As we stated in note 4 of Columbia Gas of West Virginia, Inc. v. Public Serv. Comm'n: "In areas where there is regulation and the possibility of future regulation exists, state action affecting private contracts is less likely to be found violative of the contracts clause." . . .

This is not to say, however, that prior regulation of an industry as a whole necessarily precludes every claim that subsequent legislation unconstitutionally impairs preexisting contractual obligations. In Veix v. Sixth Ward Bldg. & Loan Ass'n, supra, the Supreme Court considered the effect of amendments to a New Jersey statute altering the terms upon which a shareholder in a building and loan association could withdraw his shares. In concluding that the amendments did not unconstitutionally impair the contractual obligations of the plaintiff, who had purchased his shares when the prior statute was in effect, the Supreme Court held: "When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic." . . .

The clear import of these cases is that an impairment of contract may not be found if the prior regulation of an industry is related to the subject of the contract so as to put the parties on notice of the possibility of future regulation on the same subject. The question of how the prior regulation relates to the challenged legislation is often not easily answered. One court has stated: "[P]rior regulation must share more in common with the challenged legislation than merely the industry in which it operates to bar a subsequent finding of substantial impairment." . . . Accordingly, we "must look to the nature as well as the act of regulation" to determine whether prior regulation of the industry preempts the Contract Clause claim. . . .

Although Chapter 33 of our Code imposes considerable regulation on the sale of insurance in this state, prior to the enactment of W.Va.Code, 33-12A-1, et seq., there was never any attempt to regulate the insurer's right to hire and fire insurance agents. Accordingly, it can hardly be said that the parties here could reasonably have foreseen the creation of a "good cause" prerequisite to termination of that relationship and a private cause of action for wrongful termination at the time the contract was executed. . . .

Since we find nothing in the United States Supreme Court opinions that demands a contrary result, we conclude that the involved legislation does substantially impair contractual obligations with respect to those contracts of over five years' duration because it alters the "at will" nature of the employment relationship. . . .

Having determined that a substantial impairment exists, we must now consider whether the legislation is justified by a significant and legitimate public purpose. This requirement "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." [Energy Reserves Group. See Security Nat'l B. & T. Co. v. First W.Va. Bancorp, Inc.].

It seems clear that the primary purpose of this statute is to benefit insurance agents. Although the

legislative declaration of purpose contained in W.Va.Code, 33-12A-1, states that the legislation "is essential to the best interests of the citizens," the true purpose is clearly designated as "prohibiting arbitrary and capricious cancellation of ... contractual relationships."

We may agree that the State can have a legitimate interest in adjusting the contract rights of the parties so that insurance agents cannot be arbitrarily or capriciously fired by insurance companies. See Harless v. First Nat'l Bank, 162 W.Va. 116, 246 S.E.2d 270 (1978). However, W.Va.Code, 33-12A-1, et seq., is hardly intended to remedy "a broad and general social or economic problem" in that regard. [Energy Reserves Group; Allied Structural Steel Co.]. As developed more fully, infra, this legislation is designed to protect a narrow class of citizens, i.e., insurance agents, rather than a broad societal interest. It is not imbued with the substantial public policy that will justify state interference with the private contractual obligations of these parties.

Mr. Shell argues that the statute also benefits the general public by ensuring a pool of experienced agents. Initially, it would seem that from a practical business standpoint, if an agent is doing a good job, he will not be fired. Consequently, the pool of capable and experienced agents would not be drained.

Even if we were to conclude that Mr. Shell has asserted a legitimate public purpose justifying the impairment of the parties' preexisting contractual rights, we question whether W.Va.Code, 33-12A-1, et seq., strikes an appropriate balance between the reasonable exercise of the State's police power and legislation that simply benefits a special interest group.

The statutory scheme suggests simply that a benefit is conferred on special interests. It permits dismissal of an insurance agent only upon the most egregious grounds: (1) criminal misconduct or gross negligence relating to the business, (2) fraud or moral turpitude, (3) abandonment of the business, (4) failure to pay moneys owned to the company, (5) death or disability of agent, or (6) insolvency of the company or discontinuance of a line of insurance. W.Va.Code, 33-12A-3. However, these grounds bear no relationship to W.Va.Code, 33-12-25, which authorizes the State to revoke or suspend an insurance agent's license on the ground that he "has violated any provision of this chapter, or is incompetent or untrustworthy."

Clearly, the narrow parameters of W.Va.Code, 33-12A-1, et seq., protect an incompetent agent from dismissal in many situations and give rise to the prospect of an insurance company being forced to retain an agent whose license has been revoked or suspended, because there is not "good cause" for discharging him under the statute. This cannot be construed to be for the general good of the public.

Finally, even where "good cause" for dismissal exists under the statute, the agent may avoid dismissal under W.Va.Code, 33-12A-4, by rectifying or eliminating the grounds for discharge before the termination date. This benefits solely the agent and enables even an agent who is guilty of outrageous misconduct to keep his job. Such a provision can hardly be deemed to benefit the general public who may deal with such agents.

As we have seen, the specific language of this legislation goes far beyond the modest public purpose asserted by Mr. Shell. W.Va.Code, 33-12A-1, et seq., does not only protect insurance agents from arbitrary dismissal. It also protects the incompetent agent, enables a "good cause" ground for dismissal to be cured and thereby defeated, and shields from termination even an agent whose license has been suspended or revoked. Clearly, the scope of the legislation substantially exceeds the public purpose asserted by Mr. Shell as justifying its impairment of the contractual obligations of the parties.

From the foregoing, we conclude that W.Va.Code, 33-12A-1 et seq., precludes insurance agents from being discharged except for good cause and confers a private cause of action upon agents dismissed on other grounds. To the extent this statute affects existing rights under employment contracts executed before its effective date, it violates the Contract Clauses of the state and federal constitutions. . . .

For the reasons stated herein, we conclude that W.Va.Code, 33-12A-1, et seq., unlawfully impairs

the obligations of the parties to this action under the 1968 employment contract and is, therefore, unconstitutional in its application. . . .

NOTE ON THE CONTRACTS CLAUSE AND CHANGES TO PUBLIC EMPLOYEES' PENSIONS

In several cases, the Supreme Court of Appeals has addressed legislative efforts to ease the financial strain on underfunded pension funds of public employees by reducing benefits, increasing employees' contributions, changing the method of computation, or revising eligibility rules. *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1989), established that covered employees do acquire property rights in their statutorily created pension plans. The Court in *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995), then set forth how and when the Contracts Clause protects those rights from official curtailment. Excerpts from the Court's opinion, which was written by Justice Neely, follow:

> If the State (or its political subdivisions) promise to defer salary benefits until a person's retirement from State (or local) employment, and then promises to pay those deferred salary benefits in the form of a pension, the State (or its political subdivisions) cannot eliminate this expectancy without just compensation once an employee has substantially relied to his or her detriment. . . . [W]hen a public employee has devoted substantial service to the state that translates into substantial detrimental reliance, the State must provide just compensation for any pension expectancy it eliminates. . . .
>
> Of course, this is not to say that changes may not be made in pension systems with regard to new employees who have not yet joined the system and who have not yet relied to their detriment. Changes can be made with regard to employees with so few years of service that they cannot be said to have substantially relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed. Thus, our constitutional provision against the State's impairment of obligations of contract, W.Va. Const. art. III, § 4, means only that the government must keep its promises; art. III, § 4 does not mean or even imply that the government must make promises in the first place. Furthermore, to the extent that the government wishes to apportion future wage increases between immediate cash payments to existing workers and improved funding of pension systems, it may do so: No state or local employee has a right to a wage increase, and (as in the case before us) the State may ask workers to help make pension funds solvent by contributing to the funds new money given to them by the State for this purpose. . . .
>
> We . . . hold that the pension rights of all current plan members who have substantially relied cannot be detrimentally altered at all, and that any alterations to keep the trust fund solvent must be directed to the infusion of additional money. . . . "Detrimentally alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contributions. Should the legislature seek to reduce certain advantages of a pension plan, it must offer other equal benefits in their place as just compensation. Thus, until an employee becomes eligible to draw a pension, his or her benefits can be determined on an actuarial basis, and until such time as the employee's reliance is so strong as effectively to preclude all other options, the State may buy out the employee's contract property rights. At some point, however, the worker has chosen to remain in public employment for such a substantial part of his or her life that the State can no longer purchase the employee's pension without the acquiescence of the employee. At what point in an employee's career it is no longer equitable for the State to buy back the employee's contract rights on a sound actuarial basis without confounding the principles forbidding the impairment of contracts can be decided only on a case-by-case basis by the legislature and the courts. Of course, the legislature may always augment pension property rights.

> But the legislature cannot reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the changes to the pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.

Applying the above principles to the facts in *Booth*, the Court held, first, that an increase in the amount that state police officers' had to contribute to their pension was offset by a pay raise and other benefits and was therefore valid. On the other hand, a reduction in the cost of living adjustment from 3.75% to 2.0% to preserve the fund's solvency was void as applied to those employees who had acted in reliance on the previously established rate. "Requiring the [employees] to protect the future solvency of the pension system is an unconstitutional shifting of the state's own burden."

The Court has subsequently used the *Booth* analysis in several cases. In *Adams v. Ireland*, 207 W.Va. 1, 528 S.E.2d 197 (1999), it remanded for evidence-taking on the extent of an employee's reliance on a repealed provision that had allowed employees to add accumulated vacation pay to their final year's salary for purposes of calculating their pension benefits. *Board of Trustees v. Carenbauer*, 211 W.Va. 567 S.E.2d 612 (2002), held that a police officer had relied to his detriment on a prior provision of a benefits plan for local police officers. The officer had worked for a city department from 1979 until 1996, when a non-work related injury forced him to go on disability. In 1991, the Legislature amended the relevant statute for police benefits and provided that benefits for other than work related injuries must be reduced by one dollar for every three that the disabled employee earns. Because of his reliance, application of the change to this former officer unconstitutionally impaired his contractual rights. On the other hand, an act requiring the Public Employees Retirement System ("PERS") to invest $150,000,000 in bonds used to finance construction and repairs to regional jails did not impair employees' contractual rights. *State ex rel. West Virginia Regional Jail and Correctional Facility Authority v. West Virginia Investment Management Board*, 203 W.Va. 413, 508 S.E.2d 130 (1998). The Legislature had long directed how PERS funds should be invested, and the Act did not diminish any employee's benefits or eligibility.

2. Takings Clause

NOTES

1. Although not expressly granted in the Constitution, the power of eminent domain is inherent in and essential to the existence of government, and the power of the State to condemn private property, in appropriate cases, has therefore never been seriously questioned. *E.g., State Road Comm'n v. Board of Park Comm'rs*, 154 W.Va. 159, 173 S.E.2d 919 (1970); *State v. Boggess*, 147 W.Va. 98, 126 S.E.2d 26 (1962).

2. Article III, § 9 implicitly limits governmental takings to those designed to accomplish a "public use," and the Supreme Court of Appeals has (along with all other American courts) persistently imposed that requirement. What constitutes a "public use" has been given a very liberal construction, and the Court has been very deferential to legislative judgments on the matter. Consider the following summary from *State ex rel. Charleston v. Coghill*, 156 W.Va. 877, 207 S.E.2d 113 (1973)(Neely, J.):

> Courts are bound, except in extraordinary cases by the findings made by the Legislature, and "[a] fact once determined by the legislature, and made the basis of a legislative act, is not thereafter open to judicial investigation." *State ex rel. West Va. Housing Develop. Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969).
>
> Prior decisions of this Court have continuously enlarged the sphere of permissible government action in what was formerly considered exclusively the private sector. In *Chapman v. Housing*

> *Auth.*, 121 W.Va. 319, 3 S.E.2d 502 (1939), this Court held valid the West Virginia Housing Act which had as it primary purpose slum clearance. In *State ex rel. West Va. Housing Develop. Fund v. Copenhaver, supra*, this Court held constitutional [W. Va. Code 31-18-1, et seq.,] which provided for the West Virginia Housing Development Fund. The Fund had as its purpose an increase in the amount of housing available to West Virginia residents. Similarly in *County Court v. Demus*, [148 W.Va. 398, 135 S.E.2d 352 (1964)], this Court reviewed the Industrial Development Bond Act, . . . which permitted a county or municipality to acquire property for the purpose of leasing it for industrial purposes, and this Court again found the legislation to be without constitutional infirmities. These cases clearly establish the broad sphere of permissible governmental activity in areas where the Legislature determines that government action is a necessary supplement to private enterprise to alleviate social problems.

The *Coghill* Court then held that the establishment of a public parking facility, even when some of the parking would be reserved for private individuals, promoted a valid public purpose. *See also Handley v. Cook*, 252 S.E.2d 147 (1979)(condemnation of property to erect transmission line to a single industrial customer serves a public use).

3. As the railroad and utilities cases make clear, the State may assign to private entities the power to forcibly condemn property for specific uses. *E.g., Handley v. Cook*, supra, 252 S.E.2d at 148, n.3; *Shepherdstown Light & Water Co. v. Lucas*, 107 W.Va. 498, 148 S.E. 847 (1929).

4. In an unsurprising decision in *Foundation for Independent Living, Inc. v. Cabell-Huntington Board of Health*, 214 W.Va. 818, 591 S.E.2d 744 (2003), the Court held that an ordinance restricting smoking in indoor establishments was not a taking of property without just compensation. The ordinance promoted legitimate public health interests and did not destroy the economic use or value of the regulated properties.

5. The Court has now twice held that State underpayment of private lawyers can be so extreme as to be confiscatory and in violation of Article III, § 9. *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976)

G. Criminal Procedural Rights

Read Article III, §§ 4-6, 14, 17-19.

See FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE, Vols. 1 & 2 (1993) & Supps.

H. Right to Bear Arms and Miscellaneous Rights

Read Article III, §§ 12, 13, 21, & 22.

STATE ex rel. CITY OF PRINCETON
v. BUCKNER,
180 W.Va. 457, 377 S.E.2d 139 (1988).

McHUGH, Chief Justice:

This action is before this Court upon two certified questions from the Circuit Court of Mercer County. This action concerns the constitutionality of W.Va.Code, 61-7-1 [1975], relating to the carrying of certain types of dangerous or deadly weapons without a license, in light of the adoption

of article III, section 22 of the West Virginia Constitution, commonly referred to as "The Right to Keep And Bear Arms Amendment," and whether the legislature may reasonably regulate the right of a person to keep and bear arms in West Virginia. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel.

I

The facts in this case are uncontroverted. On March 10, 1987, a municipal police officer in the City of Princeton, in Mercer County, stopped a vehicle and arrested the driver for driving under the influence of alcohol. After searching the driver, the policeman discovered a .22 caliber automatic pistol inside the driver's jacket pocket. The driver was then asked to produce a license allowing him to carry such a [weapon] and he subsequently advised the police officer that he did not have such a license.

The police officer presented these facts to a duly elected magistrate of Mercer County, and sought a warrant for the driver's arrest for the DUI offense. The respondent advised the officer that he would not issue a warrant for carrying a dangerous and deadly weapon against the driver, based upon the magistrate's conclusion that W.Va.Code, 61-7-1 [1975] violated article III, section 22 of the West Virginia Constitution.

The prosecuting attorney then filed a writ of mandamus in the Circuit Court of Mercer County requesting the court to compel the magistrate to issue a warrant against the driver for carrying a dangerous or deadly weapon without a license in violation of [§ 61-7-1].

After a hearing on the matter, the circuit court concluded that when comparing [§ 61-7-1] and W.Va. Const. art. III, § 22, the statute was in conflict with the subsequently adopted constitutional provision. The court further concluded that article III, section 22 of the State Constitution voided that part of [the law] dealing with the carrying of firearms without a license. The court concluded that the legislature may, in some fashion, regulate the right to keep and bear arms so as not to conflict with W.Va. Const. art. III, § 22.

The court then certified the matter to this Court. The following questions were certified:

1. Is [§ 61-7-1] constitutional in light of the subsequent adoption of Article 3, Section 22 of the Constitution of West Virginia?
2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?

II

This case involves the interpretation of article III, section 22 of the West Virginia Constitution and its effect on the constitutionality of the state's weapons statute, W.Va.Code, 61-7-1 [1975], which prohibits the carrying of a dangerous or deadly weapon without a license.[2] Because both of the questions certified to this Court are so closely associated, we choose to discuss them together.

Article III, section 22 of the West Virginia Constitution was approved by the voters of this State on November 4, 1986, and succinctly states: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."

The State of West Virginia has had a long history of statutory provisions regulating the use of weapons. See generally McNeely, The Right of Who to Bear What, When, and Where--West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment, 89 W.Va.L.Rev. 1125, 1127-41

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[2]W.Va.Code, 61-7-1 [1975] provides in pertinent part:

If any person, without a state license therefor or except as provided elsewhere in this article and other provisions of this Code, carry about his person any revolver or pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail not less than six nor more than twelve months for the first offense; but upon the conviction of the same person for the second offense in this State, he shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, and, in either case, shall be fined not less than fifty dollars nor more than two hundred dollars[.]

(1987). An 1882 statute is actually the first statutory provision which is similar to the statute now before us[.] . . . The 1882 statutory provision was interpreted by this Court in State v. Workman, 35 W.Va. 367, 14 S.E. 9 (1891). The Court in Workman considered several issues regarding the right to bear arms, including the constitutional right to self-defense, the constitutionality, under the due process clause, of the weapons statute in effect in West Virginia at that time and the definition of the term "arms" in the context of the second amendment to the United States Constitution.[5]

Despite language embodied in § 7 of the 1882 weapons statute which on its face appeared to grant the right of self-defense only to persons of "good character," . . . the Court in Workman found that there was a constitutional right to self-defense guaranteed to all persons under both the due process clause of the fourteenth amendment to the United States Constitution and [Art. III, § 10] of the West Virginia Constitution. . . .

After recognizing a constitutional right to self-defense, the Court addressed the general intent of the second amendment to the United States Constitution and determined that it involved the protection of keeping and bearing arms as a popular or collective right.[6] . . . The Court concluded that "to regulate a conceded [constitutional] right is not necessarily to infringe the same." . . . In so holding, the Court compared a state's regulation of the right to keep and bear arms to the regulation of the freedoms guaranteed under the first amendment to the United States Constitution. Thus, the Court implied that a constitutional guarantee or right to keep and bear arms would subject laws regulating protected arms to the same standard of scrutiny given laws regulating first amendment freedoms. McNeely[.]

Significantly, the Court in Workman defined the term "arms" in a second amendment context as follows:

> [I]n regard to the kind of arms referred to in the [second] amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to pistols, bowie-knives, brass knuckles, billies, and other weapons as are usually employed in brawls, street fights, duels and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.

. . . Clearly, with this definition, the Court refused to include pistols as a constitutionally protected weapon pursuant to its second amendment analysis.

However, it is important to note that the definition of "arms" presented in Workman focuses on the "well regulated militia" language of the second amendment. No parallel language appears in our state constitutional amendment. Because the second amendment does not operate as a restraint upon the power of states to regulate firearms, . . . the definition of "arms" set forth in Workman is not particularly helpful in the case now before us. Moreover, the broad language embodied in our current Right to Keep and Bear Arms Amendment makes any further reexamination of the Workman definition unnecessary. . . .

The language embodied in art. III, § 22 of our State Constitution is sweeping, and we look to the well established rules of constitutional construction in order to ascertain its meaning.

At the outset we note that "[t]he fundamental principle in constitutional construction is that effect

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[5]The second amendment to the United States Constitution provides: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[6]We note that the Court in Workman interpreted the second amendment as though it was a restriction upon state as well as federal legislation. . . . Of course, since our Court's holding in Workman, the Supreme Court of the United States has determined that the second amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms. Miller v. Texas, 153 U.S. 535, 538 (1894). "Workman does not stand for the proposition that the second amendment extends to the states, but is rather a decision assuming, but not holding, that the second amendment did apply to the states." McNeely, supra at 1130 n. 29.

must be given to the intent of the framers of [the constitutional amendment] and of the people who ratified and adopted it." State ex rel. Brotherton v. Blankenship, 157 W.Va. 100, 108, 207 S.E.2d 421, 427 (1973)[.] . . . Unfortunately, no real statement of legislative intent is before us.

Questions of constitutional construction are governed by the same general rules as those applied in statutory construction. . . . It is a well established principle . . . that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." . . .

Moreover, a cardinal rule of statutory construction . . . is that a statute, or in this case a constitutional amendment, must be considered in its entirety, with effect given, if possible, to every word or phrase within the provision. . . . A constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as "'the latest expression of the will of the people.'" . . . [Because] the constitutional provision in the case before us is clear and unambiguous, this Court must apply the amendment rather than construe it. . . . Thus, the meaning of a phrase or terms would generally be sought in the plain and ordinary meaning of the words themselves. ...

W.Va.Code, 61-7-1 [1975] is written as a total proscription of the carrying of a dangerous or deadly weapon without a license or other authorization. [The section] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes. . . .

In considering the constitutionality of a particular statutory proscription against the possession of a certain weapon in public in light of the right to bear arms amendment of the state, the Supreme Court of Oregon determined that the statute was overbroad and therefore unconstitutional. State v. Blocker, 291 Or. 255, 261, 630 P.2d 824, 827 (1981). The court's insightful discussion of the overbreadth doctrine is applicable in this case:

> An 'overbroad' law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as 'broad' and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an 'overbroad' statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach....

Based upon the foregoing, we conclude that the language embodied in [61-7-1] sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, § 22. Accordingly, W.Va.Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization.

The question remains whether the State may reasonably regulate the right of a person to keep and bear arms in this State.

We stress that our holding above in no way means that the right of a person to bear arms is absolute. ... Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision. . . . Particularly, on three occasions, the Supreme Court of Oregon, in striking statutes as violative of the state's constitutional right to bear arms, has repeatedly stressed

that the court's holdings should not be construed to mean that an individual has an "unfettered right" to possess or use constitutionally protected arms in any way he chooses. The Oregon court has consistently emphasized that the legislature may regulate such possession and use. . . .

The State, through exercise of its police power, is vested with the authority to enact laws, within constitutional limits, to promote the general welfare of its citizenry. . . . In syllabus point 5 of [State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965)], this Court defines the State's police power as follows:

> The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As civilization becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.

. . . At least forty-two jurisdictions have constitutional provisions guaranteeing a right to bear arms; however, most are distinguishable from art. III, § 22 either in their failure to specifically recognize the right to self-defense, or in their express recognition that the constitutional provision is subject to legislative regulation. See R. Dowlut & J. Knoop, State Constitutions and the Right to Keep and Bear Arms, 7 Okla. City U.L.Rev. 177, 236-240 (1982). The State, in the appendix to its brief, cites thirteen states which, like art. III, § 22, grant a rather broad, unrestrictive right to bear arms for the defense of self and the state. With the exception of Vermont, which imposes no significant regulation, the remaining jurisdictions regulate the ownership and use of arms in general, particularly handguns.

Again excluding Vermont, certain statutory regulations are common to most of the jurisdictions having constitutional provisions comparable to West Virginia's. For instance, the prohibition against the possession or ownership of handguns by persons previously convicted of a felony or other specified crime is widely accepted. Four states prohibit the open or concealed carrying of handguns without a license or permit; several others specifically prohibit carrying a concealed handgun without a license, while at least one of these jurisdictions, namely, Arizona, further prohibits carrying a handgun in public establishments or certain specified public places.

West Virginia does not regulate the carrying of a weapon on one's own premises nor prohibit the carrying of such weapon to and from places where they may be lawfully used, i.e., target-shooting clubs and hunting grounds. ... Pursuant to W.Va.Code, 61-7-2[,] any person desiring to obtain a license to carry a weapon must meet the following requirements: (1) is a citizen of the United States; (2) has been a resident of West Virginia for at least one year next prior to the date of application; (3) is an adult of good moral character and temperate habits; (4) has not been convicted of any felony or handgun offense; (5) has been employed for five years; (6) is qualified to handle handguns; (7) has "good reason and cause" to carry such wea-pon; and (8) must post a $5000 surety bond.

The regulatory requirements, embodied in [61-7-2] rather than being unique, are for the most part found in the fourteen states with similar constitutional provisions. Of the three states whose constitutional provisions most closely resemble our own, Connecticut, Indiana, and Michigan, two require the licenses to be a United States citizen and resident of the state; all three require that the licensee be of good character or a "suitable person;" two require that the licensee be an adult; all three prohibit possession by persons convicted of a felony; two require that the licensee demonstrate good cause or proper reason to carry a weapon; and one requires that a licensee not be addicted to drugs or alcohol. . . .

Based upon the foregoing, we conclude that the right to keep and bear arms guaranteed by W.Va. Const. art. III, § 22 is not unlimited. The individual's right to keep and bear arms and the State's duty, under it police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced. . . . Accordingly, the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." However, a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed in our State Constitution. ...

For the foregoing reasons, we answer the first certified question in the negative and the second in the affirmative and remand this action to the Circuit Court . . ..

NOTES

1. *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990). Daniel was convicted of first degree murder and malicious wounding after he shot and killed one person and injured another. He argued on appeal that the circuit court's decision to "permit" the jury to infer malice from the intentional use of a deadly weapon violated Article III, § 22. In rejecting that argument, the Supreme Court cited West Virginia Code 61-7-11, which makes it unlawful "to carry, brandish, or use [a firearm or other deadly weapon] in a way or manner to cause, or threaten, a breach of the peace." threatening manner. While § 22 bestows the right to bear a firearm, it does not give "the citizen the right to use that weapon unlawfully, as described in W. Va. Code § 61-7-11."

2. *In re Application of Metheney*, 182 W.Va. 722, 391 S.E.2d 635 (W.Va. 1990). In an opinion by Justice Brotherton, the Court sustained W.Va. Code 61-7-4, which prescribes the standards and procedures for granting a license to carry a concealed deadly weapon. The law requires a person seeking such a license to apply to the circuit court* in his county of residence and to prove he is a U.S. citizen; a resident of W.Va. and the county; 18 or older; has not been convicted of a felony or act of violence involving the misuse of such deadly weapon; desires to carry the weapon "for the defense of self, family, home or state, or other lawful purpose"; is physically and mentally competent to carry such weapon; and has received adequate instruction in properly using the weapon. The act further directs the circuit court to hold a hearing, if necessary, and if the above standards are met, to grant the license. If the court denies the application, it must include in its final order its findings of fact and conclusions of law. In this case, the circuit judge denied the applications, although Justice Brotherton's opinion did not indicate the lower courts' reasons for the denials.

The applicants' primary arguments were that § 61-7-4 violated Article III, § 22 and that the lower courts had erroneously denied the applications. The Supreme Court rejected both contentions.

Citing *Buckner*, the Court held the "legislature, through the proper exercise of its valid police power, could reasonably regulate the right to keep and bear arms in order to promote the health and safety of citizens of this State." Furthermore, § 61-7-4 was such a regulation; it "in no way infringes upon a citizen's right to keep and bear arms. It merely regulates the manner in which a citizen may do so, given the inherently dangerous nature of a concealed weapon."

Regarding these particular applications and their rejections, the Supreme Court simply deferred

*The statute has since been changed to require application to the county sheriff, with a right of appeal to circuit court.

to the judgment of the circuit judges. Justice Brotherton elaborated:

> If the [circuit] court is allowed no discretion, we can find no reason for the legislature to permit the circuit court to take evidence on the "application or the proof" to see if the purpose of the application was for the "defense of self, family, home or state, or other lawful purpose." If the circuit court was required to accept the bald assertions of the applicant, as the appellants contend, we fail to see why a hearing is allowed and the judge permitted to grant or deny the license based upon that proof. Surely nothing more than an administrative registrar would be necessary if the circuit court judge had no discretion to look behind the application.

The practical effect of this ruling is that the circuit judge has a virtually unreviewable prerogative to deny the application. That reading is reenforced by the fact that one of the applicants in Metheney was a prominent attorney with long-standing ties to the community and absolutely no record of criminal or violent behavior.

3. *State ex rel. West Virginia Division of Natural Resources v. Cline*, 200 W.Va. 101, 488 S.E.2d 376 (1997). *Cline* sustained West Virginia Code 20-2-5(10), a provision in the laws regulating hunting that prohibits carrying loaded firearms in or on any vehicle. Noting that Article III, § 22 safeguards the right to "keep and bear arms with regard to hunting only if such hunting is lawful," Justice Davis's opinion for the Court explained that the statute in question "specifically denotes that carrying a loaded firearm in a vehicle is an unlawful manner of hunting. Thus, applying Section 22 to the statute in question demonstrates that there is no conflict between the two provisions since transportation of a loaded firearm is not a lawful method of hunting with firearms. As an unlawful manner of hunting, the transportation of a loaded firearm is not subject to constitutional protection."

According to Davis, *Bruckner* "determined that the legislature could reasonably regulate an individual's right to keep and bear arms, but cautioned that a 'legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved.'" Section 20-2-5(10), she concluded, promoted the State's "interest in protecting its citizens from the dangers of transporting loaded firearms. Prohibiting the vehicular transportation of loaded firearms is the only manner in which citizens can be protected from the potential discharge of loaded firearms in vehicles. The restriction is reasonable because it does not infringe upon a sportsperson's right to keep and bear arms for hunting purposes. Rather, it merely regulates the manner in which such weapons may be transported. Likewise, this statute is narrowly tailored to achieve the State's purpose. As noted above, the only manner in which to protect individuals from the accidental discharge of loaded firearms transported in vehicles is to require all such weapons to be unloaded."

Justice Maynard filed a long and frothy dissent. For example:

> The overwhelming majority of the voters of this state desire the right to keep and bear arms for defense of self, family, home and state, for lawful hunting, and for recreational purposes. With this holding, however, this Court has flagrantly disregarded the will of the great majority and sided, instead, with the 15% who would interfere with those who keep and bear arms for lawful purposes. In so doing, this Court is only doing what courts all over America do: thwart democracy by ignoring the will of the people. While the will of the majority is regularly done by the executive and legislative branches of government, it is just as regularly ignored everywhere by the courts in favor of the wishes of special interest groups with radical agendas. These groups can only impose their will on the majority with the aid of the courts. That is not democratic. It does not matter if one is in favor of guns or not, we should all be in favor of democracy. On this issue in West Virginia the great majority has spoken. Democratic principles demand that this Court listen.
>
> The Court's holding in this case leaves the right to keep and bear arms in an extremely vague and contradictory state. Considering the uncertainty and confusion now confronting gun owners, I am reminded of a fellow I once knew when in happier times I lived in southern West Virginia. His

name was Jim Tom. Like most true West Virginians, Jim Tom really loved the outdoors and spent every possible minute in the woods and mountains. Unfortunately, however, Jim Tom was absolutely terrified of snakes. He was so afraid of snakes that all the time he spent outdoors was marred by the constant fear he would be bitten by a snake. Jim Tom continued to be absolutely obsessed with this unreasonable fear, until one day when his friend, who was also his doctor, gave him a bottle of rattlesnake anti-venom. Suddenly, his problem was solved. Jim Tom placed the bottle of anti-venom in the pocket of his hunting vest, and began to enjoy nature to its fullest, secure in the knowledge that if he were ever bitten, immediate help was at hand.

One day, however, Jim Tom's worst fears were realized when he stepped on a rotten log and was bitten by a huge rattlesnake. Sheer panic seized him but suddenly gave way to soothing relief, when Jim Tom remembered the bottle of anti-venom in his vest. He calmly and very carefully removed the bottle of anti-venom and slowly sat down to read the directions for use printed on the package. But it was with a sinking heart and a sense of doom that poor old Jim Tom realized that the directions had been written by the West Virginia Supreme Court of Appeals!

4. *Hartley Hill Hunt Club v. Ritchie County Commission*, 220 W.Va. 382, 647 S.E.2d 818 (2007), upheld a statute authorizing counties to hold referenda on whether to ban hunting on Sundays. (Forty-one counties voted to install a ban.) The Court held that § 22 preserved the Legislature's authority to impose reasonable regulations on the use of firearms and other weapons. A ban on hunting one day a week was a reasonable means for maintaining quiet on a day of rest, permitting the quiet enjoyment of private property, and of managing the State's wildlife resources. Allowing the counties to decide whether to maintain the ban was not an unconstitutional delegation of power.
